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Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ORIGINAL

JOHN JOSEPH ROMANO,

Petitioner,

-v-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

EDITOR'S NOTE

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49 PR

QUESTIONS PRESENTED

1. Can a state appellate court, consistent with the Eighth and Fourteenth Amendments to the United States Constitution, hold that an error occurred that had the potential of diminishing the jury's sense of responsibility yet not vacate the sentence of death imposed by that jury without determining either that the error had "no effect" on the sentencing determination or that the error did not present an unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously?
2. Can a state appellate court, consistent with the Eighth and Fourteenth Amendments to the United States Constitution, refuse to consider allegations of error briefed on direct appeal of a capital case?

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To: The Honorable Chief Justice and Associate Justices
of the United States Supreme Court

Petitioner prays that a Writ of Certiorari issue to review the
judgment of the Oklahoma Court of Criminal Appeals entered in this
case on the 13th day of January, 1993.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is
published and may be found at 847 P.2d 368 (Okla.Cr.1993) (affirming
the convictions and sentence of death). The opinion is attached to
this Petition as Appendix A. The Order Denying Rehearing was not
reported and is attached as Appendix B.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was
entered on the 13th day of January, 1993. A timely petition for
rehearing was denied on March 17, 1993. Jurisdiction of this Court
is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII:

Excessive bail shall not be required, nor excessive fines
imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV (excerpt):

No State shall make or enforce any law which shall
abridge the privileges or immunities of citizens of the
United States; nor shall any State deprive any person of
life, liberty, or property, without due process of law;
nor deny to any person within its jurisdiction the equal
protection of the laws.

Okla. Stat. tit. 21, § 701.13(1991) (excerpts):

B. The Oklahoma Court of Criminal Appeals shall consider
the punishment as well as any error enumerated by way of
appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
2. Whether the evidence supports the jury's of judge's finding of a statutory aggravating circumstance as enumerated in Section 701.12 of this title.

STATEMENT OF THE CASE

On January 30, 1987, the Petitioner, JOHN JOSEPH ROMANO, was sentenced to death for the murder of Loyd Thompson in Oklahoma County District Court Case No. CRF-86-3920. One day before the sentence was formally imposed, he was charged with the unrelated murder of Roger Sarfaty in Oklahoma County Case No. CRF-86-1231. The State sought the death penalty, alleging four aggravating circumstances, including that the Petitioner had been previously convicted of a felony (specifically, the murder of Loyd Thompson) involving the use or threat of violence to the person. The only support for this allegation was the Judgment and Sentence for the Thompson murder conviction, which was on direct appeal. The Judgment and Sentence, introduced into evidence over vehement objection by defense counsel, reflected that the Petitioner had already been sentenced to death.

During the pendency of the appeal of the conviction for the murder of Roger Sarfaty, the murder conviction and accompanying death sentence for the killing of Loyd Thompson were reversed for a new trial.

On direct appeal of the Sarfaty murder conviction, in Proposition of Error XVII in Petitioner's Brief-in-Chief, the Petitioner argued that the sentence of death was unreliable under the Eighth Amendment because the jury's sense of responsibility was diminished by the introduction of the Judgment and Sentence informing the jury that Mr. Romano was already under a sentence of death for another crime, coupled with certain acts and comments by the trial court and the prosecutors. The Oklahoma Court of Criminal Appeals agreed that the fact that Mr. Romano had been sentenced to death by another jury was irrelevant. The court also conceded that the jury's learning a defendant had previously been sentenced to death for another murder "could diminish the jury's sense of importance of its role and mitigate the consequences of their decision." 847 P.2d at 390. Despite having recognized the error's potential to diminish the jury's sense of responsibility, the court held that it was "highly unlikely" that this error had such effect because the jury had been instructed in their responsibility to weigh the evidence and to follow the law. The court further held that the erroneous "admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process." The death sentence was affirmed. 847 P.2d at 390-91.

In affirming the death sentence, the Oklahoma Court of Criminal Appeals failed to address three errors that had been fully briefed on appeal. Two issues, raised and briefed by the

Petitioner in a pro se brief and accepted for filing by the court, argued that the State was barred and/or estopped from prosecuting the Petitioner in the present case because the State had used the evidence of the Sarfaty homicide to obtain the death penalty in the Thompson homicide trial. Although the court addressed a separate and distinct double jeopardy argument concerning re-litigating an aggravating circumstance rejected in the first (Thompson) murder trial, the court did not address the double jeopardy arguments concerning whether the Petitioner could be tried at all for the homicide of Sarfaty once the State used that evidence to secure a death sentence in another trial.

The third issue, fully briefed by appellate counsel, concerned an issue that arose during the pendency of the appeal. State law requires the Court of Criminal Appeals to determine whether the evidence supports the jury's finding of statutory aggravating circumstances. The State had offered three items of evidence to support the "continuing threat" aggravating circumstance: that the Petitioner had previously been convicted of murder; the testimony of an informant; and that this murder was committed in a violent fashion. The prior conviction was also offered to support the aggravating circumstance of prior felony involving the use or threat of violence.

By the time the Court of Criminal Appeals undertook the statutorily-required review, the evidence supporting two of the aggravating circumstances had materially changed. As previously stated, while this case was on appeal, the other murder conviction

was vacated. Additionally, the informant recanted his testimony and avowed in an affidavit that he had fabricated the testimony in order to curry favor with the district attorney on charges he was then facing.

In compliance with court rules, appellate counsel tendered a supplemental brief raising an additional assignment of error, in light of the new developments, regarding the sufficiency of the evidence supporting the aggravating factors "continuing threat" and "previous conviction involving the use or threat of violence," as well as the reliability of the sentence. Although the court did address the impact of the vacation of the previous murder conviction on the aggravating circumstance of "previous conviction of a felony involving the use or threat of violence", the impact of the vacation of the previous murder conviction on the aggravating circumstance of "continuing threat" was ignored or overlooked by the Court of Criminal Appeals, along with the impact of the informant's recantation and the two issues briefed by the Petitioner.

In a Petition for Rehearing, appellate counsel pointed out the oversight and reurged the errors. In the Order Denying Petition for Rehearing, the court erroneously stated that the issues had been fully addressed in the opinion.

REASONS FOR GRANTING THE WRIT

I.

This Court should grant certiorari to resolve a split of authority among the state and federal circuit courts regarding the standard to determine whether Caldwell errors require vacation of a death sentence.

The standard of review employed by the Oklahoma Court of Criminal Appeals in deciding that it was "highly unlikely" that admission of an exhibit reflecting that the Petitioner had already been sentenced to death "would" have diminished the jury's sense of responsibility is in conflict with other state and federal circuit courts that have decided this issue.

Both the Illinois Supreme Court and the Mississippi Supreme Court have been faced with this exact issue and have decided that evidence of a prior death sentence is wholly inadmissible, prejudicial, and destroys the reliability of the death sentence.

The Mississippi Supreme Court decided the case of West v. State, 463 So.2d 1048 (Miss. 1985), shortly before this Court announced the decision in Caldwell v. Mississippi, 472 U.S. 320 (1985). The court reasoned that "if the jury knows that the appellant is already under a sentence of death it would tend to relieve them of their separate responsibility to make that determination." Id. at 1052-53. Without discussing whether this error might have been harmless, the court reversed the case for this and other errors that occurred at trial.

The same error occurred in the case of People v. Hope, 106 Ill.2d 265, 508 N.E.2d 202 (Ill. 1986). Several jurors heard news reports on the capital case on which they were sitting. The news

reports contained information that the defendant had previously been sentenced to death. The Illinois Supreme Court held: "The possibility that the jury, even one member, may have sentenced the defendant to death on the basis of an irrelevant, highly prejudicial and non-statutory aggravating factor constitutes reversible error." 508 N.E.2d at 206 (emphasis added).

Counsel has found no federal circuit case involving this same type of Caldwell error. For other types of Caldwell errors, however, the circuits are split on the standard to employ once a Caldwell error is found. The Fifth Circuit uses the same test employed by the plurality in Caldwell, namely, that the error had "no effect" on the jury. See Sawyer v. Butler, 881 F.2d 1273, 1284-85 (5th Cir. 1989) (en banc), aff'd on other grounds, 497 U.S. 225 (1990). The Tenth Circuit has held that the sentence must be vacated when there is a "substantial possibility" that the error affected the sentencing decision. See Hopkinson v. Shilinger, 888 F.2d 1286, 1295 (10th Cir. 1989). Finally, the Eleventh Circuit uses the "reasonable probability" test, that the sentence must be vacated if there is a reasonable probability that, but for the Caldwell error, the outcome would have been different. See Tucker v. Kemp, 802 F.2d 1293, 1295-96 (11th Cir. 1986) (en banc) (per curiam), cert. denied, 480 U.S. 911 (1987).

The Oklahoma Court of Criminal Appeals' nebulous "highly unlikely" test directly conflicts with the clear per se prejudice holdings of the Illinois and Mississippi courts. Moreover, the "highly unlikely" test adds a confusing test to the existing "no

effect", "substantial possibility", and "reasonable probability" tests utilized in the federal courts. This Court should grant certiorari to determine the appropriate standard for review of a Caldwell error and resolve the split of authority in the courts below.

II.

This Court should grant certiorari to decide the important question of whether an appellate court can uphold a death sentence after finding that the jury's sense of responsibility could have been diminished by having been informed that the Petitioner whose fate they are to determine has already been sentenced to die for another murder merely by finding that it is "highly unlikely" that the error would have had that effect.

The Oklahoma Court of Criminal Appeals acknowledged that informing the jury that the defendant has already been sentenced to die has the potential for diminishing the jury's sense of responsibility. Rather than applying the "no effect" test formulated by the plurality in Caldwell v. Mississippi, 472 U.S. 320 (1985), however, the Oklahoma court fashioned its own less stringent test: the court stated that the instructions to the jury concerning their responsibilities made it "highly unlikely that the jury's sense of responsibility would have been diminished based upon their knowledge of the prior imposition of the death sentence." Romano v. State, 847 P.2d at 390 (Okla.Cr.1993).

The Oklahoma test derogates the Eighth Amendment right to reliable sentencing in capital cases and impermissibly places the burden of proof on the Petitioner to show that he was in fact prejudiced by the error.

The Oklahoma court's analysis is confusing. The court acknowledged that capital cases require heightened scrutiny [under the Eighth Amendment], but then reviewed the error under the Fourteenth Amendment instead ("the determination to impose the death penalty [was not] a denial of due process.") Id. at 391. Furthermore, the Oklahoma court afforded the sentencing determination "a presumption of correctness" and found "no reason to question the jury's conclusion." Id.

Although the court determined that the error created a risk that the penalty was imposed arbitrarily or capriciously ("[l]earning that the defendant had previously received a death sentence for another murder could diminish the jury's sense of importance of its role and mitigate the consequences of their decision" 847 P.2d at 390), the court did not determine, as did the plurality in Caldwell, that the error had no effect on the jury's determination. The court's analysis and conclusion are in conflict with the Eighth Amendment.

Moreover, the Oklahoma court impermissibly placed the burden of proving prejudice on the Petitioner. Just this term this Court expounded on the different standards of review for forfeited and non-forfeited errors. Justice O'Connor, writing for the Court in U.S. v. Olano, No. 91-1306 (Apr. 4, 1993), explained that the difference between "harmless error" and "plain error" is the allocation of the burden of proof. If the error was not brought to the attention of the trial court, the appellate court cannot correct the error unless the defendant shows the error was

prejudicial. If error was brought to the attention of the trial court, the appellate court has authority to correct the error unless the error did not affect substantial rights.

In this case, the error was clearly not forfeited as Petitioner's trial counsel strenuously objected to having the jury exposed to an exhibit reflecting that the Petitioner had already been sentenced by another jury to die. The objection was overruled and the exhibit was admitted. Although this substantial Eighth Amendment error was in no way forfeited, the Oklahoma Court of Criminal Appeals apparently allocated the burden of proving prejudice on the Petitioner rather than on the state ("it is highly unlikely that the jury's sense of responsibility would have been diminished"). Romano, 847 P.2d at 390.

This Court should grant certiorari to determine whether the allocation of the burden of proof and the standard of review promulgated by the Oklahoma Court of Criminal Appeals is consistent with the Eighth and Fourteenth Amendments to the United States Constitution.

III.

This Court should grant certiorari and remand the case back to the Oklahoma Court of Criminal Appeals with a directive to address all issues raised on direct appeal for the reason that direct appeal is an important and necessary safeguard against the arbitrary and capricious imposition of the death penalty.

The Oklahoma Court of Criminal Appeals failed to address three errors raised, all of which were founded in the Constitution. State law requires the Court of Criminal Appeals to make a

determination on all errors raised and to determine whether the aggravating circumstances are supported by the evidence. See Okla. Stat. tit. 21, §§ 701.13(B) and (C)(2)(1991). Nevertheless, the court failed in this case to address three fully-briefed errors of constitutional magnitude, one of which involved a determination of whether an aggravating circumstance was supported by legal evidence.

In upholding the constitutionality of the death penalty statutes of Georgia, Texas, and Florida in Gregg v. Georgia, 428 U.S. 153 (1976), Jurek v. Texas, 428 U.S. 262 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), respectively, this Court stressed the importance of appellate review in death penalty cases. The plurality in Gregg characterized the automatic appellate review as "an important additional safeguard against arbitrariness and caprice." 428 U.S. at 198. Justice White, concurring in the judgment and joined by then Chief Justice Burger and present Chief Justice Rehnquist, agreed that Georgia's provision for appellate review was an important aspect of the legislative scheme. Id. at 211 (WHITE, J., concurring in the judgment).

Likewise, the plurality in Jurek entrusted the provision for "prompt judicial review of the jury's decision in a court with statewide jurisdiction. . . to promote the evenhanded, rational, and consistent imposition of death sentences under [Texas] law." 428 U.S. at 276. The same view was echoed again in Proffitt, where the plurality determined that any risk that the death penalty might

be imposed arbitrarily or capriciously would be "minimized by Florida's appellate review system." 428 U.S. at 251.

The Court of Criminal Appeals' refusal on direct appeal of this capital case to address assignments of error of constitutional magnitude stripped the defendant of one of the major safeguards against arbitrariness and caprice and destroyed the reliability of sentencing. The Oklahoma Court's claim that these issues were addressed is belied by the Opinion itself. Stating that the issues have been addressed cannot substitute for actually addressing the issues.

The statutory requirement that all constitutional errors enumerated be considered promotes reliability and finality of death penalty decisions. This Court should grant certiorari to compel the Court of Criminal Appeals to follow state law, which was enacted in conformance with this Court's rulings, and address all the issues that were raised in the direct appeal of this case.

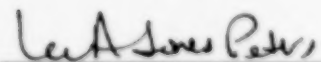
CONCLUSION

For the foregoing reasons, Petitioner respectfully request that this petition for a writ of certiorari will be granted.

Petitioner respectfully requests that this Court vacate the death sentence in this case and grant such other relief as it deems appropriate.

Respectfully submitted,

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COUNSEL FOR PETITIONER

No. _____

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October Term, 1992

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Petitioner,

-v-

STATE OF OKLAHOMA,

Respondent.

CERTIFICATE OF SERVICE

I, Lee Ann Jones Peters, member of the bar of this Court, do hereby certify that I have this day served a copy of Petitioner's Petition for Writ of Certiorari to the Court of Criminal Appeals for the State of Oklahoma, and Motion to Proceed In Forma Pauperis, on counsel for Respondent, State of Oklahoma, by depositing the same with the United States Mail with adequate first class postage, addressed to Sandra D. Howard, Chief of Criminal Division, Office of the Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105 this 11th day of June, 1993. All parties required to be served have been served.



LEE ANN JONES PETERS

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APPENDIX "A"

Opinion of the Oklahoma Court of Criminal Appeals

Romano v. State, 847 P.2d 368 (Ok1.Cr.1993)

to confuse the mother's alleged wilfulness in getting pregnant against all advice and common sense, with the requirement that the pregnancy be "adequate of itself" to cause the result. The result was that Donald died after four days of life. Even under defendants' theory two things were required to combine to bring about Donald's death: (1) the doctor's negligent failure to administer Rho-GAM following her fourth pregnancy, and (2) her wilful pregnancy knowing of her condition. Her pregnancy alone, even if deliberate, was not "adequate of itself" to cause the result.

The doctors have not conceded that the failure to give Rho-GAM amounted to negligence. The question of supervening cause will not come into play, however, unless it is determined that there was some earlier actionable act or omission by the doctors. See *Thompson*, 652 P.2d at 264. Regardless of the outcome of this issue, an instruction on supervening cause is not warranted. If there is no negligence on the part of the doctors, the instruction is superfluous. If there is negligence by the doctors, the second prong of the test is still not satisfied and the instruction would be improper. The supervening cause instruction should not be given where, as here, the result could not have come about in the absence of the first actor's alleged misconduct, which was failure to give Rho-GAM. The mother's alleged wilful and foolish impregnation could not have been "adequate of itself" to cause the result.

SIMMS, Justice, concurring in part, dissenting in part:

In my opinion the instruction containing the language "elected to become pregnant" is neither vague nor ambiguous. I believe the instruction was properly given to the jury and I dissent to that part of the majority opinion holding otherwise.



John Joseph ROMANO, Appellant.

STATE of Oklahoma, Appellee.

No. F-87-441.

Court of Criminal Appeals of Oklahoma

Jan. 13, 1993

Rehearing Denied March 17, 1993.

Defendant was convicted of murder first degree and robbery with dangerous weapon, in the District Court, Oklahoma County, William Saied, J. Defendant appealed. The Court of Criminal Appeals, Lumpkin, V.P.J., held that: (1) evidence supported conviction; (2) conviction for other murder, which was ultimately reversed, could not be used as prior felony conviction aggravating factor in imposition of death penalty; and (3) with invalid aggravating factor nor considered, remaining aggravating factors continued to outweigh mitigating factors.

Affirmed.

1. Criminal Law ¶1166.16

Capital murder defendant was precluded from claiming that hearing was required as to whether prospective juror had communicated knowledge of another murder for which defendant was convicted, due to prospect's employment of that murder victim's daughter; defendant had not used peremptory challenge to exclude prospect and exhausted all of his other peremptory challenges.

2. Jury ¶99(1)

Constitutional guaranty of fair and impartial trial does not exclude service of juror having knowledge of facts and circumstances involving case, but only by juror who uses that knowledge to form opinions concerning merits of case, or who forms negative opinion of defendant based on that knowledge. U.S.C.A. Const. Amend. 6.

RIES

ph ROMANO, Appellant.

v.

of ahoma, Appellee.

No. F-87-441.

minal Appeals of Oklahoma.

Jan. 13, 1993.

Denied March 17, 1993.

t was convicted of murder in and robbery with dangerous ne District Court, Oklahoma am Saied, J. Defendant ap Court of Criminal Appeals, P.J., held that: (1) evidence viction; (2) conviction for an, which was ultimately re not be used as prior felony gravating factor in imposition dity; and (3) with invalid ag tor nor considered, remaining actors continued to outweigh stors.

as, ¶1166.16

urder defendant was preclud ing that hearing was required r prospective juror had com owledge of another murder endant was convicted, due to ployment of that murder vic er, defendant had not used hallenge to exclude prospect, d all of his other peremptory

(1)

ional guaranty of fair and im does not exclude service by knowledge of facts and cir volution case, but only by ju that knowledge to form opin ing merits of case, or who e opinion of defendant based owledge. U.S.C.A. Const.

3. Criminal Law ¶868

Hearing was not required to determine whether jury foreman in capital murder case had knowledge of defendant's involvement in another murder and had passed it on to jury; all members of jury had been subjected to "exhaustive" voir dire and had affirmed their ability to determine case impartially based only upon competent evidence. U.S.C.A. Const. Amend. 6.

4. Criminal Law ¶868

Hearing was not required to determine whether jury had been improperly provided with information regarding an earlier murder involving capital murder defendant, by jury foreman who knew daughter of victim in other murder, even though when other murder was mentioned during reading of bill of particulars, two jurors exhibited some surprise. U.S.C.A. Const. Amend. 6.

5. Criminal Law ¶868

Hearing was not required to determine whether jury considering capital murder case had been improperly provided with information regarding another murder case in which defendant had been involved, by jury foreman who knew daughter of victim in that murder, even though jury had reported to judge that they were deadlocked six to six, and had returned conviction just a few hours later. U.S.C.A. Const. Amend. 6.

6. Criminal Law ¶41.13(2)

Capital murder defendant was not denied effective assistance of counsel by virtue of his attorney's deciding to retain on jury panel juror who knew daughter of murder victim in another case involving defendant; decision was trial strategy and in any event defendant failed to show how ultimate decision would have been different had juror in question not served. U.S.C.A. Const. Amend. 6.

7. Jury ¶33(1.4)

Quashing of jury panel in capital murder case was not required on grounds that statute allowing jurors 70 years of age to opt out of jury service prevented jury from being representative of cross section of community; defendant had failed to make necessary prima facie showing that exemp-

tion excluded significantly numerous and distinct group, that representation of this group in venire panels was not fair and reasonable in relation to number of people in community, and that underrepresentation was due to systematic exclusion of group from jury selection process. 38 Okl. St. Ann. § 28, subd. A.

8. Jury ¶131(13)

Voir dire of each prospective jury member, as to his or her attitude on capital punishment, was not required in capital murder case. U.S.C.A. Const. Amend. 6.

9. Jury ¶33(2.1), 108

Prospective jurors were not improperly removed from panel in capital murder case in order to obtain jury panel predisposed to imposing death penalty; most jurors in question stated they believed in death penalty but wavered throughout voir dire on their ability to actually impose sentence, supporting conclusion that their capital punishment views would have prevented or substantially impaired their duties as jurors. U.S.C.A. Const. Amend. 6.

10. Jury ¶33(2.1, 5.1)

Principle of *Batson* case, that state could not use peremptory challenge to remove prospective juror solely because of race, did not extend so as to prohibit state from exercising peremptory challenge to jurors in capital murder case from whom court received equivocal response on voir dire question as to willingness to impose death sentence. U.S.C.A. Const. Amend. 6.

11. Criminal Law ¶552(3)

When evidence against defendant is wholly circumstantial, considering evidence and inferences therefrom in light most favorable to state, evidence must be inconsistent with any reasonable hypothesis other than defendant's guilt.

12. Criminal Law ¶552(3)

In order to obtain a conviction based upon circumstantial evidence, state is not required to exclude every conceivable hypothesis or negate any possibility other than guilt.

13. Criminal Law §422(1)

When two or more defendants are charged with acting in concert, evidence against each is available against others.

14. Homicide §253(1)

Evidence supported conviction for capital murder; witness testified that defendant had told him he planned to rob victim and would have to kill him, victim was known to keep in his apartment buckets of change for use at store and shortly after estimated time of death defendant was apprehended in possession of numerous quarters, papers used to wrap jewelry were found near defendant's car and defendant had been seen with jewelry, and rope had been taken from accomplice's room which could have been used to strangle victim.

15. Criminal Law §1171.1(3)

Capital murder defendant had received a fair trial, even though he claimed 14 instances of prosecutorial misconduct during first-stage closing argument allegedly involving misrepresentation, vouching for credibility of prosecution witness, denigrating defense witnesses, eliciting sympathy for victim and aligning himself with jury; although some remarks, taken singly, exceeded bounds of fair argument, comments in context did not seriously affect fairness of trial. U.S.C.A. Const. Amend. 6.

16. Criminal Law §1163(1)

Determination that evidence should be excluded as irrelevant should be affirmed unless there is clear showing of abuse accompanied by prejudice.

17. Criminal Law §359

In order for evidence tending to show that another person has committed crime to be admissible, there must be some showing of an overt act on part of another toward commission of crime; it is not sufficient to show possible motive on part of another.

18. Homicide §178(1)

Capital murder defendant was properly precluded from introducing evidence that alleged prostitute at local club might have been murderer of victim; there was indication that she knew victim from club he frequented, but there was no indication

that she was victim's girlfriend or had any involvement with murder.

19. Homicide §178(1)

Capital murder defendant was properly precluded from introducing evidence that woman with whom victim had been seen arguing shortly before estimated time of his death was perpetrator; police had been unable to locate woman and there was no further evidence linking her to incident.

20. Homicide §178(1)

Evidence tending to show that another person had committed capital murder could be excluded; even though alleged perpetrator knew decedent from frequenting same pool hall and had been destitute before decedent's death and seen with cash and jewelry after death, there was no overt act shown toward commission of murder.

21. Criminal Law §419(2)

Statement by witness in capital murder case, that it was common knowledge around pool hall that victim who was patron had been killed on certain date and body not discovered until later, was admissible over hearsay objection; statement was offered not as to time of death of victim, but rather as to patrons' understanding of time of death.

22. Criminal Law §404.5

Demonstrative evidence is admissible if relevant and probative value outweighs prejudicial effect.

23. Criminal Law §404.65

Rope removed from residence of codefendant in capital murder case was admissible as demonstrative evidence; victim had been killed by strangulation, medical examiner found rope to be consistent with ligature marks on victim's body, and presence of rope allowed jury to visualize one of weapons used in attack.

24. Criminal Law §476.1

Police detective could furnish expert witness testimony, in capital murder case, as to how rope recovered from house of codefendant had been tied in a garrotte, and could demonstrate how it could have been used as murder weapon; subject mat-

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is victim's girlfriend or had any involvement with murder.

de §178(1)

m. or defendant was properly precluded from introducing evidence that woman with whom victim had been seen shortly before estimated time of death as perpetrator; police had been unable to locate woman and there was no evidence linking her to incident.

de §178(1)

e tending to show that another person had committed capital murder could be excluded; even though alleged perpetrator knew decedent from frequenting same pool hall and had been destitute before death and seen with cash and jewelry after death, there was no overt act shown toward commission of murder.

d Law §419(2)

nt by witness in capital murder case, that it was common knowledge around pool hall that victim who was patron had been killed on certain date and body not discovered until later, was admissible over hearsay objection; statement was offered not as to time of death of victim, but rather as to patrons' understanding of time of death.

d Law §404.5

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d Law §404.65

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ter was specialized and beyond knowledge of average juror. 12 Okl.St. Ann. §§ 2401, 2702.

25. Criminal Law §706(6)

Police officer could demonstrate, using assistant district attorney as model, how rope taken from house of codefendant was allegedly used as garrotte to strangle victim in capital murder case, over claim that demonstration was prejudicial; demonstration was useful to jury, as general public was not familiar with use of garrotte or process of strangulation.

26. Constitutional Law §47

When reviewing constitutionality of legislative act, court does not look to Constitution to determine whether legislature is authorized to do an act, but rather to see whether act is prohibited.

27. Criminal Law §1206.1(2)

Statute providing that jury rendering verdict of unanimous recommendation of death was required to designate in writing statutory aggravating circumstances or circumstances which it unanimously found beyond reasonable doubt, did not violate constitutional prohibition against court orders forcing jury to make findings of particular questions of fact; constitutional provision applied to guilt phase of trial, rather than sentencing phase. 21 Okl.St. Ann. § 701.11; Const. Art. 2, § 19; Art. 7, § 15.

28. Homicide §357(11)

Aggravating circumstance required for death penalty in capital murder case, that murder was especially heinous, atrocious or cruel, was not unconstitutionally vague; it had been narrowed through jury instruction to apply only to instances of death preceded by torture or serious physical abuse.

29. Criminal Law §1159.5

When sufficiency of evidence of aggravating circumstance is challenged on appeal in capital murder case, proper test is whether there was any competent evidence to support state's claim that aggravating circumstance existed.

30. Homicide §357(11)

Evidence supported finding of aggravated circumstance based on heinousness of crime, in sentencing phase of capital murder case; there was evidence victim had struggled with assailants, was beaten with blunt instrument several times and ultimately died of strangulation.

31. Homicide §358(1)

For purposes of establishing, as aggravating circumstance in sentencing phase of capital murder case, that defendant had killed victim for purpose of avoiding or preventing lawful arrest or prosecution, intent of defendant may be inferred from circumstantial evidence.

32. Homicide §357(8)

Evidence supported presence of aggravating factor, in sentencing phase of capital murder case, that defendant had killed victim for purpose of avoiding or preventing lawful arrest or prosecution; witness had testified defendant told him that it would be necessary for defendant to kill victim in connection with planned robbery in order to keep victim from identifying him.

33. Homicide §357(6)

Jury's refusal to accept, as an aggravating factor in sentencing phase of capital murder case, that defendant presented continuing threat to society, did not preclude use of same evidence to establish continuous threat aggravation factor in later trial involving different victim. U.S.C.A. Const. Amend. 5; Const. Art. 2, § 21.

34. Homicide §357(6)

Aggravating circumstance for purposes of imposing death sentence in capital murder case, that defendant posed continuing threat to society, was not unconstitutionally vague; factor was readily understandable.

35. Homicide §358(1)

Evidence tending to show that capital murder defendant had committed another murder was admissible, in sentencing phase, as tending to prove aggravating circumstance that defendant presented "con-

tinuing threat" to society, even though defendant's conviction was not final.

36. Homicide — 358(1)

Evidence tending to show that capital murder defendant had committed another homicide could be introduced in support of aggravating factor of continuing danger to society in sentencing phase of capital murder case, even though conviction for first murder had been reversed and case remanded for new trial; case had not been reversed on basis of insufficient evidence of guilt.

37. Homicide — 357(7)

Prior conviction of capital murder defendant for having committed another murder, which had been reversed on appeal, could no longer provide support for aggravating factor in sentencing phase of capital murder case, that defendant had committed "prior violent felony."

38. Constitutional Law — 203

Criminal Law — 1134(3)

Jury — 31(11)

Court of Criminal Appeals could reweigh aggravating and mitigating circumstances, considered by jury in sentencing phase of capital murder case, to determine whether death penalty was still warranted after one of aggravating factors had been invalidated, without depriving defendant of constitutional right to be tried by jury or prohibition against ex post facto laws. U.S.C.A. Const. Art. 1, §§ 9, cl. 3, 10, cl. 1; Amend. 6.

39. Criminal Law — 655(1), 723(1)

Comment by judge to jury, that its function was to recommend punishment, and comment by prosecutor during closing argument that jury was to "put the defendant on death row" did not diminish jury's sense of responsibility for determining death sentence. U.S.C.A. Const. Amend. 5.

40. Criminal Law — 449(2)

Jail chaplain could not be asked to give her opinion as to whether religious accomplishments of capital murder defendant while incarcerated were genuine or represented "jailhouse religion"; any such opinion would have been mere speculation on

her part and not helpful to clear understanding of issue. 12 Okl.St. Ann. § 2701.

41. Criminal Law — 723(1)

State's closing argument in sentencing phase of capital murder case, which made reference to defendant having taken up "jailhouse religion," was not objectionable; argument was reasonable inference based upon defendant's raising of term while questioning jail chaplain, and defendant's apparent attempt to prove genuineness of defendant's religion.

42. Criminal Law — 796

Instruction that jury was to consider as mitigating factors at sentencing phase, those which in fairness and mercy could be considered as extenuating or reducing degree of moral culpability or blame, coupled with instruction that what was mitigating evidence was for jury to determine, did not prevent jury from considering any relevant mitigating evidence. 21 Okl.St. Ann. § 701.11.

43. Homicide — 311

Trial court was not required to instruct jury, in capital murder case, that it had option to return life sentence regardless of its findings respecting aggravating and mitigating circumstances. 21 Okl.St. Ann. § 701.11.

44. Homicide — 311

Trial court could instruct jury, in sentencing phase of capital murder case, that it could not allow sympathy, sentiment or prejudice to enter into its deliberations.

45. Homicide — 311

Trial court properly instructed jury, in capital murder case, that finding of aggravating circumstances beyond reasonable doubt was in itself not enough to assess death penalty, and that aggravating circumstances must clearly outweigh mitigating circumstances before death could be imposed.

46. Homicide — 357(1)

While state must prove beyond reasonable doubt existence of at least one of enumerated aggravating circumstances, before death sentence can be imposed in capi-

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le — 357(1)

While state must prove beyond reasonable doubt existence of at least one of enumerated aggravating circumstances, before death sentence can be imposed in capi-

tal murder case, determination of weight to be accorded aggravating and mitigating circumstances is not a fact which must be proved beyond reasonable doubt, but is rather a balancing process.

47. Criminal Law — 1208.1(4)

Death penalty was not unconstitutional for allowing unbridled prosecutorial discretion in seeking that penalty. U.S.C.A. Const. Amend. 8.

48. Robbery — 30

One thousand-year prison sentence, imposed on capital murder defendant for robbery committed at same time, was not excessive; it was supported by prior felony convictions and violent manner in which robbery was committed. U.S.C.A. Const. Amend. 8.

49. Homicide — 357(4, 8, 11)

Aggravating factors in capital murder case, that crime was particularly heinous, atrocious or cruel, committed to avoid lawful arrest or prosecution, by defendant presenting continuous threat to society, outweighed mitigating factors consisting of testimony regarding difficult childhood, love and respect of family and friends, record of being good worker, status as trustee in county jail and role as problem solver, completion of bible study courses and involvement in jail ministry, and prospects of rehabilitation.

An appeal from the district court of Oklahoma County, William Saied, District Judge.

John Joseph Romano, Appellant, was tried by jury and convicted of Robbery with a Dangerous Weapon, After Former Conviction of a Felony (21 O.S.1981, § 801) and Murder in the First Degree (21 O.S.1981, § 701.7) in Case No. CRF-87-397, in the District Court of Oklahoma County. The jury found the existence of four aggravating circumstances and recommended punishment of death. The trial court sentenced accordingly. From this judgment and sentence Appellant has perfected this appeal. AFFIRMED.

1. In January, 1987, Appellant and co-defendant

Cindy Foley, Tim Wilson, Asst. Public Defenders, Oklahoma City, Trial Counsel for appellant.

Lee Ann Jones Peters, Chief, Appellate Div., William C. Devinney, Asst. Appellate Public Defender, Oklahoma City, Appellate Counsel for appellant.

Robert Macy, Dist. Atty., Lou Keel, Gary Ryan, Asst. Dist. Attys., Oklahoma City, Trial Counsel for appellee.

Robert H. Henry, Atty. Gen. of Oklahoma, Carol Price Dillingham, Asst. Atty. Gen., Oklahoma City, Appellate Counsel for appellee.

OPINION

LUMPKIN, Vice-Presiding Judge:

Appellant John Joseph Romano was tried by jury and convicted of Murder in the First Degree (21 O.S.1981, § 701.7) and Robbery with a Dangerous Weapon, After Former Conviction of Two or More Felonies (21 O.S.1981, § 801), Case No. CRF-87-397, in the District Court of Oklahoma County. The jury found the existence of four aggravating circumstances and recommended punishment of death for the murder conviction and one thousand (1000) years imprisonment for the robbery conviction. The trial court sentenced accordingly. From this judgment and sentence Appellant has perfected this appeal.

Appellant and co-defendant David Woodruff were found guilty of the first degree murder of Roger Sarfaty. The decedent's body was discovered on October 16, 1983, in his apartment in Oklahoma City. The decedent had been beaten, strangled and stabbed. Further facts will be presented as necessary.

1. JURY SELECTION ISSUES

[1] Appellant contends that it was reversible error for the trial court to refuse to conduct a hearing as to whether jury foreman McDonald had knowledge of Appellant's involvement in the Lloyd Thompson murder¹ and whether this knowledge

Woodruff were convicted of the first degree

had been communicated to the jury. The record reveals that Mr. Eugene McDonald was one of the original twelve venirepersons called to service. The State's list of witnesses was belatedly read to the jury, preceding the eighth peremptory challenge to the panel. One of the venirepersons stated that he recognized the name "Cheryl Moody" as that of a secretary at his place of employment. Although the prospective juror is not identified by name in the transcript, the Appellant states that it was Mr. McDonald. This is not disputed by the State. The following exchange then took place:

MR. KEEL: (Prosecutor) In the event she is called to testify in this case, is there anything about the relationship you have had from what you have known of Cheryl Moody, to this point, that you think would make it hard for you to be fair and listen to the testimony. In other words, because of you having known her, would you give her more or less weight her testimony than you would anybody else?

PROSPECTIVE JUROR: No, sir.

MR. KEEL: So you can be fair to both sides in this case in spite of that?

PROSPECTIVE JUROR: I believe so. (Vol. II, Tr. 193-194)

The defense did not question him further, did not challenge him for cause nor remove him with a peremptory challenge. At that time, Appellant and co-defendant Woodruff each had one (1) peremptory challenge remaining. Both challenges were waived. Mr. McDonald remained on the jury and was ultimately selected as foreman.

On the seventh day of trial, before closing arguments were to be given in the second stage, counsel for Appellant and co-defendant Woodruff asked that the jurors be individually questioned to determine whether during first stage deliberations

murder of Lloyd Thompson and sentenced to death.

2. The record reflects that the jury began its first stage deliberations on May 22, 1987. Sometime before 6:30 p.m., the jury reported to the trial judge that it was split 6 to 6. The jury was then sent to dinner before resuming its deliberations.

they had learned of the defendants' connection with the Thompson murder. It was revealed that Cheryl Moody was the daughter of Lloyd Thompson.

The reason given by defense counsel for the motion was their opinion that the jury did not react appropriately to the State's reading of the bill of particulars and the mention of the convictions for the Thompson murder and the length of time during first stage deliberations.² The trial court denied the motion, stating that to grant it would violate the sanctity of the jury.

Appellant now argues in the alternative that failure to hold a hearing to determine whether Mr. McDonald communicated his knowledge to the other jurors was error, the failure to excuse McDonald from the jury was error, and that trial counsel was ineffective for failing to remove him from the jury. We disagree with Appellant's arguments and find no reason for reversal or modification. The record reflects that Mr. McDonald was competent to serve as a juror and that Appellant has failed to show that he was denied a fair trial by Mr. McDonald's service on the jury. The question of the competency of jurors is addressed to the sound discretion of the trial court, and absent an abuse thereof, the finding of the trial court will not be upset on review. *Greathouse v. State*, 503 P.2d 239, 240 (Okla. Cr. 1972).

During voir dire, Mr. McDonald clearly indicated that he understood that the defendants were presumed to be innocent of the charges against them; that the State had the burden of proof and if the State did not meet that burden of proving guilt beyond a reasonable doubt, that the defendants must be found not guilty. He further indicated that he could keep an open mind and listen to all the evidence presented by both the State and the defense and that he knew of no reason why he could not

A verdict of guilty was returned that same day. Comments by defense counsel indicate that the jury returned approximately five (5) hours after announcing their deadlock with a guilty verdict, while comments by the trial court indicate it was one hour.

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be a fair juror. He assured defense counsel that he would hold the State to its burden of proof and make them prove each and every element, beyond a reasonable doubt, of the crimes charged against the defendants. Mr. McDonald indicated that he could follow the court's instructions as to the law, and that he was not prejudiced against the defendants. (Vol. I, Tr. 83, 154-155, 174)

By failing to exercise his last peremptory challenge, Appellant has waived whatever claim he may have had concerning the partiality or improper makeup of the jury. See *Greathouse*, 503 P.2d at 241 (wherein the trial judge refused to grant a mistrial after a juror indicated that he knew one of the State's witnesses. The conviction was affirmed based on the juror's indication that knowledge of the witness would not affect his partiality. We held that when defense counsel failed to inquire as to the knowledge of the witness by the juror, any error was waived.) See also *Hamilton v. State*, 79 Okla. Cr. 124, 152 P.2d 291, 295 (1944).

[2,3] However, due to the nature of Appellant's allegations, we will address the issue further. The jury trial system is founded on the impartiality of a body of peers selected by counsel. Voir dire is the procedure designed to give a criminal defendant the opportunity to explore the opinions and personal knowledge of potential jurors who may ultimately decide his fate. One of the purposes of voir dire is to ensure a criminal defendant's right to a fair and impartial jury. The critical fact to be determined is whether the defendant received a fair trial from jurors who could lay aside any personal opinions and base a verdict on the evidence.

In the present case, the trial court conducted an exhaustive voir dire. Those prospective jurors with preconceived opinions for or against Appellant, who could not set aside those opinions or who had doubts about their ability to be impartial, were excused. The remaining prospective jurors were questioned further as to their knowledge of persons involved in the case. Counsel for the State and for both defen-

dants carefully questioned each prospective juror to make certain that each could lay aside any emotion he or she might have concerning this case and depend solely on the evidence presented during trial to decide the outcome. As a result, we find that the defendants were left with twelve impartial jurors.

The mere fact that Mr. McDonald knew Lloyd Thompson's daughter does not render him incapable of serving on the jury. A criminal defendant is not entitled to jurors who know nothing about his case. See *Hale v. State*, 750 P.2d 130, 134 (Okla. Cr. 1988), cert. denied, 488 U.S. 878, 109 S.Ct. 195, 102 L.Ed.2d 164 (1988); *Brecheen v. State*, 732 P.2d 889, 892 (Okla. Cr. 1987), cert. denied, 485 U.S. 909, 108 S.Ct. 1085, 99 L.Ed.2d 244 (1988); *Wooldridge v. State*, 659 P.2d 943, 946 (Okla. Cr. 1983). The constitutional guarantee of a fair and impartial trial does not exclude service by a juror with knowledge of facts and circumstances involving the case, but only those persons who use that knowledge to form opinion concerning the merits of the case, or who form a negative opinion of the defendant based on that knowledge. *Smith v. State*, 385 P.2d 920, 924 (Okla. Cr. 1963).

[4,5] Judge Saied's refusal to hold a voir dire hearing to determine whether or not any improper information had been imparted to the other jurors was a proper determination. In order to establish juror misconduct, "a defendant must show actual prejudice from any alleged jury misconduct and defense counsel's mere speculation and surmise is insufficient upon which to cause reversal". *Chatham v. State*, 712 P.2d 69, 71 (Okla. Cr. 1986). See also *Parsons v. State*, 603 P.2d 1144, 1146 (Okla. Cr. 1979).

The record in the present case is absolutely barren of anything other than speculation or surmise by defense counsel. Judge Saied, an experienced trial judge, disputed defense counsel's observations on the record. He stated that he observed the jury during the reading of the bill of particulars. At the mention of the prior murder conviction, he noticed two jurors in particular who showed some surprise. He added that he did not think that Mr. McDonald

knew of the murder conviction, but if he did, there was nothing to indicate that he had said anything about it to the other members of the jury. Regarding the length of the first stage jury deliberations, he did not find it unusual to have a jury deadlocked 6 to 6 and return a few hours later with a guilty verdict. He further commented:

[i]f I did this I think I would be violating sanctity of the jury itself. They have deliberated and we have no right to go in and ask how they did it and why they did it. I have given them an admonition every time, a very strong one I think you all know. In fact I add to it more than was actually required by statute, and it has been a very strong admonition in my opinion. I can't invade the province of the jury and ask them his question.... (Vol. VII, Tr. 5)

Whether or not to hold an evidentiary hearing was within the discretion of the trial court. Finding no abuse of that discretion, we find no error.

[6] Similarly, we do not find defense counsel's decision to leave Mr. McDonald on the jury indicative of ineffective assistance of counsel; in spite of a comment by the trial judge that he thought Mr. McDonald would be removed by the defense. Counsel admitted that the decision not to remove Mr. McDonald was a part of their trial strategy. In hindsight, it may appear to the Appellant that the strategy may not have been appropriate, but this is not sufficient to meet the test of ineffectiveness established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We have previously refused to evaluate the performance of trial counsel on hindsight. *Dunham v. State*, 762 P.2d 969, 975 (Okla.Cr.1988); *Smith v. State*, 650 P.2d 904, 908 (Okla.Cr.1982). Further, through the review of cases on appeal, this court is familiar with trial counsel for both defendants and find them to be experienced, capable capital litigators whose strategic choice to leave Mr. McDonald on the jury was well within the range of professionally reasonable judgment.

We find that Appellant was not prejudiced by counsel's decision as he has failed to show that there is a reasonable probability that the outcome of the case would have been different. Based upon the foregoing, we find that Appellant is not entitled relief due to the service of Mr. McDonald on the jury. Accordingly, this assignment of error is denied.

[7] Prior to trial Appellant filed a Motion to Quash the jury panel asserting then as he does now on appeal that he was denied a jury representative of a fair cross-section of the community because 38 O.S. 1981, § 28(A), allows jurors seventy years of age or above to opt out of jury service. In *Moore v. State*, 736 P.2d 161, 165 (Okla.Cr.1987), *cert. denied*, 484 U.S. 873, 108 S.Ct. 212, 98 L.Ed.2d 163 (1987), we stated that *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), held that a defendant must establish a prima facie case in order to show a violation of the requirement that criminal defendants are entitled to juries drawn from a fair-cross section of the community. Appellant has failed to make such a prima facie showing in the instant case, as he has not shown that this exemption from jury service excludes a sufficiently numerous and distinct group, that representation of this group in venires is not fair and reasonable in relation to the number of such people in the community, and that this underrepresentation is due to the systematic exclusion of the group in the jury selection process. *Sellers v. State*, 809 P.2d 676, 682 (Okla.Cr.1991); *Fox v. State*, 779 P.2d 562, 566 (Okla.Cr.1989). Accordingly, this assignment of error is denied.

[8] Appellant also alleges that the trial court erred in not allowing individual voir dire of each juror, out of the hearing of the others, as to their views on capital punishment. In *Foster v. State*, 714 P.2d 1031, 1037 (Okla.Cr.1986), *cert. denied*, 479 U.S. 873, 107 S.Ct. 249, 93 L.Ed.2d 173 (1986), we stated:

[a]lthough such a practice may be allowed by a trial judge, it is an extraordinary measure.... Unless the danger of prejudicing the jurors by exposure to

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such a practice may be allowed by a trial judge, it is an extraordinary measure.... Unless the danger of prejudicing the jurors by exposure to

damaging information is a grave problem or some special purpose would be served, it is unlikely that individual voir dire would be justified. We find no abuse of discretion in not allowing the procedure.

Nor do we find any abuse of discretion in this case. The record reflects that both the State and the defense conducted an extensive voir dire examination. It does not appear that Appellant was prejudiced by not questioning the venire individually. *Sellers*, 809 P.2d at 682; *Fox*, 779 P.2d at 568; *Vowell v. State*, 728 P.2d 854, 857 (Okla.Cr.1986). Accordingly, this assignment of error is denied.

[9] Appellant also alleges that the prosecutor's use of peremptory challenges to remove all potential jurors with any reservations about the death penalty produced a jury "uncommonly willing to condemn a man to die" in violation of the rule *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). He also urges extension of the rule of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), that the State cannot use a peremptory challenge to remove a prospective juror solely because of race, to require that this Court prohibit the State from exercising a peremptory challenge to excuse a juror from whom the court received equivocal responses on voir dire.

In *Witherspoon* the Supreme Court held that the exclusion of those potential jurors who express "conscientious scruples" against the death penalty violates a defendant's right to a fair and impartial jury. A standard was established that a venireperson could be excused from jury service on a capital case only if he or she made "unmistakably clear" his or her automatic refusal to impose a death sentence or an inability to impartially judge a defendant's guilt. In *Walker v. State*, 723 P.2d 273, 281 (Okla.Cr.1986), this Court recognized that the Supreme Court had superseded the *Witherspoon* standard into a single test of "whether the juror's view would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v.*

3. Venirepersons Stark and Paine.

Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This single test not only eliminated the requirement that a juror would vote automatically against the death penalty before he or she may be excused, but also removed the requirement that such a view must be proved with "unmistakable clarity." *Id.*, 469 U.S. at 424, 105 S.Ct. at 852.

Applying this rule to the instant case, we find that the two prospective jurors³ in question were not improperly removed from the panel. Both stated that they believed in the death penalty but wavered throughout voir dire on their ability to actually impose such a sentence. We find that their responses established the fact that their views about capital punishment would have prevented or substantially impaired their duties as jurors in accordance with the instructions and their oath. See *Battenfield v. State*, 816 P.2d 555, 558 (Okla.Cr.1991); *Banks v. State*, 701 P.2d 418, 423 (Okla.Cr.1985) *cert. denied*, 486 U.S. 1036, 108 S.Ct. 2024, 100 L.Ed.2d 611 (1988).

[10] In *Batson* the Supreme Court determined that the Equal Protection Clause prohibits "exclusion of potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89, 106 S.Ct. at 1719. This rule does not alter existing principles which entitle a prosecutor "to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his view concerning the outcome of the case to be tried." *Id.* No authority supports the proposition that equivocal jurors create a suspect class which invokes the stringent requirements of the Equal Protection Clause, and which would permit extension of the limited *Batson* rule. To the contrary, peremptory challenges need not be supported by any specific reasoning, unless the defendant asserts purposeful discrimination under *Batson*. 22 O.S.1981, § 654. We have previously held that both the

State and the defense may excuse prospective jurors who respond equivocally to questions about the death penalty. *White v. State*, 674 P.2d 31 (Okla.Cr.1983). We are not persuaded to change our view.

No violation of equal protection principles arose in the present case. We have found no evidence in the record to suggest that jury selection involved purposeful discrimination or yielded a jury with an uncommon willingness to impose the death penalty. Accordingly, this assignment of error is denied.

II. GUILT-INNOCENCE ISSUES

In his second assignment of error, Appellant contends that the evidence presented at trial was insufficient to support the verdicts of guilt. He argues that the circumstantial nature of the evidence of both the murder and the robbery, at best, raised only suspicion and speculation of guilt.

[11, 12] Circumstantial evidence and the reasonable inferences drawn therefrom have the same probative effect as direct testimony. When the evidence against the defendant is wholly circumstantial, as in this case, considering the evidence and inferences therefrom in the light most favorable to the State, it must be inconsistent with any reasonable hypothesis other than the defendant's guilt. *Greer v. State*, 763 P.2d 106, 107 (Okla.Cr.1988); *Smith v. State*, 695 P.2d 1360, 1362 (Okla.Cr.1985). The State is not required to exclude every conceivable hypothesis or negate any possibility other than guilt. *D.R.R. v. State*, 734 P.2d 310, 311 (Okla.Cr.1987).

[13] When an appellant contends that he was convicted upon insufficient evidence, this Court must consider and examine the entire record. *Lee v. State*, 661 P.2d 1345, 1354 (Okla.Cr.1983). While each co-defendant is entitled to have his case decided on the basis of the evidence against him, this does not require this Court to review the evidence in a vacuum. Where two or more defendants are charged with acting in concert, evidence against each is available against the others. *Cooper v. State*, 584 P.2d 234, 237 (Okla.Cr.1978).

[14] The evidence presented by the State in the instant case showed that the decedent was a jewelry dealer who lived alone in an apartment at the May Ridge Apartment complex in Oklahoma City. The decedent kept large amounts of jewelry, both new and older tarnished pieces, in his apartment. The decedent was also known to wear jewelry, particularly rings on every finger. In his apartment the decedent kept large cardboard buckets of change, specifically quarters. He was a regular customer at the Celebrity Club coming in every night at approximately 12:30 and remaining until the 2:00 a.m. closing. The decedent was last seen leaving the club on Saturday, October 12, 2:00 a.m.

On October 16, 1985, the decedent was found murdered. He had been beaten, strangled and stabbed five (5) times. Testimony from medical witnesses indicated that he had been dead for approximately two to three days. A newspaper, dated October 12, 1985, was found opened in his apartment. Rolled, unopened newspapers dated October 13, 14, and 15, 1985, were found outside the apartment. No bucket of change were found in the apartment nor was any jewelry found on the decedent. A pair of slacks with the pockets pulled out was found draped over a door.

Appellant was incarcerated at the Enid Community Treatment Center during September and October 1985. He regularly received leave passes from the Center, including a weekend pass for October 11 through 13, 1985, when he checked out to Oklahoma City. While in Oklahoma City Appellant would stay at the residence of his girlfriend Marilyn Tyson. After one of Appellant's visits in late September or early October, Ms. Tyson discovered that some of her jewelry was missing. She questioned Appellant about the jewelry but he denied any knowledge. He stated that he would try to find out what happened to the missing pieces. When Ms. Tyson subsequently informed Appellant that she would turn the information over to her insurance company and would make known to the police her suspicions of him, Appellant be-

came upset and asked for more time to find out what happened to the jewelry. At a later date, Appellant told Ms. Tyson that he found out that the missing jewelry had been pawned to a jeweler and that the jeweler had been killed.

During the early part of October 1985, Appellant phoned Tracy Greggs and asked him to take him to meet the decedent to talk over some business. Greggs picked Appellant up at Ms. Tyson's home and drove him to the decedent's apartment. Appellant told Greggs that he had some rings which belonged to Ms. Tyson that he wanted to sell to Sarfaty. Appellant stated that he needed some money and had planned to rob Sarfaty and steal some of his jewelry, but as Sarfaty knew him he would also have to kill him. Appellant attempted to elicit Greggs' aid, but Greggs refused to participate. The decedent was found murdered a few days after this conversation.

On Saturday afternoon, October 12, 1985, Appellant and co-defendant Woodruff were together in a store in Quail Springs Mall. The two men were carrying cups of beer and appeared to be intoxicated. When they spilled the beer and vomited in the store, security was called to remove them. Woodruff initially refused to leave, announcing that he wanted to purchase a television. He told the clerk that they did not need any credit, that they had money. He and Appellant then emptied their pockets of quarters. The store clerk also testified that she saw what appeared to be a blood stain on Woodruff's pant leg. She said that he showed her a small cut on his hand.

Eventually, the men cooperated with the security personnel and were removed from the store. The quarters, estimated to be between \$15.00 and \$30.00 worth, but not counted, were scooped up in Appellant's baseball cap. Appellant and Woodruff were retained in a holding cell until they could be turned over to the Oklahoma City Police Department. A lock blade knife was removed from one of them.

Under a charge of disorderly conduct and public intoxication, the men were trans-

ferred to the Detox Center. All of the personal belongings were sent with the Procedures for booking a person into the Detox Center were more relaxed than those used in the county jail. Although not directly removed from him, a knife and tools were listed as property checked by Romano. Both men refused to check any money or jewelry.

Denise Howe, Woodruff's girlfriend, subsequently picked up Appellant and Woodruff at the Center. Under their direction she drove them back to Quail Springs Mall to retrieve Woodruff's car. She observed numerous small "diamond" papers (papers used to wrap diamonds and other gemstones) surrounding the car. Ms. Howe testified that the following day she saw Woodruff with some gold jewelry she had not seen previously. She described the jewelry, a necklace and five or six rings, as looking old and tarnished. She said that Woodruff did not have the money to purchase the jewelry. Woodruff subsequently mailed the jewelry to a friend in California.

On October 16, 1985, at the residence shared with Ms. Howe, Woodruff received a phone call from the Enid Community Treatment Center. He and Ms. Howe subsequently drove out to the May Ridge Apartments. The sight of numerous police cars made Appellant nervous and fidgety and the two turned around and drove home.

Denise Howe further testified to receiving a phone call from Woodruff, after he had been taken into custody, to "clear out the house". In response to such request she removed pieces of rope, a watch and a pair of gloves. These items were later turned over to the police. A portion of the rope was tied in a fashion known as a garotte. The medical examiner testified that the width of the rope was consistent with the ligature marks found on the decedent.

This Court has held repeatedly that the jury is the exclusive judge of the weight of the evidence and the credibility of the witnesses' testimony. *Hollan v. State*, 671 P.2d 861, 864 (Okla.Cr.1984); *Isom v. State*, 646 P.2d 1288, 1292 (Okla.Cr.1982). At

though there may be conflict in the testimony, if there is competent evidence to support the jury's finding, this Court will not disturb the verdict on appeal. *Enoch v. State*, 495 P.2d 411, 412 (Okla. Cr. 1972). A reviewing court must accept all reasons, inferences and credibility choices that tend to support the verdict. See *Washington v. State*, 729 P.2d 509, 510 (Okla. Cr. 1986).

Here the jury found sufficient evidence of guilt although Appellant thoroughly cross-examined the State's witnesses, successfully drawing attention to certain inconsistencies; placed before the jury names of several other persons who could have been responsible for the decedent's murder; and presented a witness who stated that he saw the decedent Sunday morning, the day after the State theorized the decedent was killed. In our review of the evidence, we find that sufficient evidence of guilt was presented to support the jury's findings and that such evidence satisfies the "reasonable hypothesis" test, demonstrating more than a suspicion of guilt. Therefore, we refuse to interfere with the jury's verdicts of guilt and this assignment of error is denied.

[15] In his third assignment of error Appellant contends that he was denied a fair trial by prosecutorial misconduct. Appellant has specified approximately fourteen (14) instances during first stage closing argument arguing that the prosecutor deliberately misrepresented the evidence, vouched for the credibility of prosecution witnesses, denigrated defense witnesses, elicited sympathy for the victim and aligned himself with the jury. Ten (10) of these remarks were met with objections by the defense. Two (2) of these objections were sustained while the rest were overruled. In three (3) instances the jury was admonished to rely on its own memory of the evidence. We have carefully reviewed each of the allegations and find that the complained of remarks did not affect the outcome of this trial and that they neither separately nor cumulatively warrant modification or reversal.

It is well established that prosecutors are entitled to fully discuss the evidence from

their standpoint, drawing all logical inferences and deductions arising from that evidence. *Holt v. State*, 628 P.2d 1170, 1171 (Okla. Cr. 1981); *Glidewell v. State*, 626 P.2d 1351, 1353 (Okla. Cr. 1981). We recognize, as did the United States Supreme Court in *United States v. Young*, 470 U.S. 1, 10, 105 S.Ct. 1038, 1043, 84 L.Ed.2d 1, 9 (1985), that "in the heat of argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be prejudicial to the accused." However, "... a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Id.*, 470 U.S. at 11, 105 S.Ct. at 1044, 84 L.Ed.2d at 11. This Court has held that in order for the remarks of the prosecuting attorney to constitute reversible error they must be flagrant and of such a nature as to be prejudicial to the defendant. *Collins v. State*, 758 P.2d 340, 341 (Okla. Cr. 1988); *Wimberli v. State*, 536 P.2d 945, 952 (Okla. Cr. 1975). From a practical standpoint, every slight excess by the prosecutor does not require that a verdict be overturned and that a new trial be ordered. *Aiuppa v. United States*, 393 F.2d 597 (10th Cir. 1968).

While some of the remarks, taken singly, exceeded the bounds of fair argument, the prosecutor's comments, when read in context, did not deprive Appellant of a fair trial. The record reveals no showing of a bad faith attempt to prejudice the jury nor an intentional emphasis upon collateral matters. Many of the complained of remarks came during the second portion of the closing argument, in reply to Appellant's closing argument. As we are not persuaded that the challenged remarks seriously affected the fairness of the trial, this assignment of error is denied.

[16] In his fourth assignment of error Appellant asserts that the trial court infringed upon his constitutional rights to confront the witnesses against him and to present witnesses in his defense by preventing him from eliciting relevant evi-

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[17] In his fourth assignment of error Appellant asserts that the trial court infringed upon his constitutional rights to confront the witnesses against him and to present witnesses in his defense by preventing him from eliciting relevant evi-

dence indicating the involvement of others in the crimes charged.

During the course of the trial it became evident that the theory of defense was that of innocence and that someone other than the Appellant was responsible for the murder. Appellant's attempts to introduce evidence of the involvement of T.R. Ballard, Kathy Ford and Susan Babbitt were frequently met with objections by the State; objections which the trial court sustained. Questions concerning the relevancy of particular evidence are within the discretion of the trial court. *Fitch v. State*, 738 P.2d 177, 180 (Okla. Cr. 1987). A determination that the evidence should be excluded as irrelevant should be affirmed unless there is a clear showing of abuse accompanied by prejudice. *Klinekole v. State*, 705 P.2d 179, 184 (Okla. Cr. 1985).

[17] In *Quinn v. State*, 55 Okla. Cr. 116, 25 P.2d 711 (1933), this Court held that evidence offered to show that some other person committed the crime charged must connect such other person with the fact; that is some overt act on the part of another towards the commission of the crime itself. There must be evidence of acts or circumstances that tend clearly to point to another, rather than the accused. See also *Case v. State*, 555 P.2d 619, 623 (Okla. Cr. 1976). We addressed this issue again in *Tahdoahnippah v. State*, 610 P.2d 808, 810 (Okla. Cr. 1980), and stated that it was not enough to show a possible motive on the part of another; the evidence must show an overt act by the third person toward the commission of a crime.

[18] Appellant attempted to interject evidence that the decedent was involved with prostitutes, one of which was Susan Babbitt. Babbitt's name was brought up during the cross-examination of Detective Sealy. He testified that a Susan Babbitt was located but the police were unable to connect her with the Appellant, other than as an acquaintance from the Celebrity Club. Sealy stated that his investigation revealed that she was not the decedent's girlfriend and that no connection could be drawn between Ms. Babbitt and Kathy Ford.

[19, 20] Much of the evidence Appellant wanted to introduce about Kathy Ford came in either over the State's objection or with no objection from the State. Detective Sealy testified on cross-examination that the name Kathy Ford had come up in the investigation into the murder; however, they were not able to verify any actual person known to be Kathy Ford. An offer of proof was made by Appellant that, if permitted, Detective Sealy would testify that the name Kathy Ford came up several times as having possibly set the decedent up and robbed him.

During his case in chief, Appellant established that the decedent had last been seen by a neighbor arguing with a blonde headed woman. Evidence was also introduced to show that a knife had been sold to a person who gave her name as Kathy Ford. As with Susan Babbitt, none of the evidence presented or included in the offers of proof connected Ford with the commission of the murder. Appellant was also able to place before the jury substantial evidence of T.R. Ballard. However, evidence that Ballard knew the decedent from frequenting the same pool hall, that Ballard was destitute before the decedent's death, but seen with cash and jewelry after the murder, shows no overt act by him in the commission of the murder.

An offer of proof was made that Ballard's name was mentioned frequently in police reports. Defense counsel stated that, if permitted, Tom Farris would testify that Ballard and the decedent had business dealings and that the decedent had some problems with Ballard. When the court inquired into what the problems were and whether threats had been made defense counsel did not specifically respond to the court's inquiry but stated that the evidence was offered to show motive and opportunity. It was also stated that a witness testified as to Ballard's having slapped the decedent at some point in time. The court sustained the State's objection and informed the defense that the evidence could come in during the testimony of the witness who made the statement. No such testimony was ever offered. Without that

testimony or further evidence showing some act by Ballard in furtherance of the murder, we find the trial court properly ruled that further evidence was not relevant.

[21] Appellant contends in his fifth assignment of error that the trial court erred in admitting prejudicial hearsay testimony from prosecution witness Jerry Jones. Mr. Jones testified to a conversation he had with several men, including Appellant, at a pool hall in Oklahoma City on October 12, 1985. Appellant specifically objects to Jones' testimony that it was common knowledge around the pool hall which he and Appellant frequented that the decedent was murdered on a Saturday and that the body had been discovered on a Monday or Tuesday. Appellant's objection was overruled and Jones was permitted to testify further that the above information was common knowledge because the owner of the pool hall had an acquaintance who was a medical examiner.

Appellant argues that Jones' third hand information was clearly hearsay for which no exception exists and was not admissible for any purpose. We disagree. In *Williams v. State*, 542 P.2d 554 (Okl.Cr. 1975), *vacated on other grounds*, *Williams v. Oklahoma*, 428 U.S. 907, 96 S.Ct. 3218, 49 L.Ed.2d 1215 (1976) we stated:

... The clearest case of hearsay is where a witness testifies to the declaration of another for the purpose of proving the facts asserted by the declarant. The hearsay rule, however, does not operate, even apart from its exceptions, to render inadmissible every statement repeated by a witness as made by another person. It does not exclude evidence offered to prove the fact that a statement was made or a conversation was had, rather than the truth of what was said. Where the mere fact that a statement was made or a conversation was had is independently relevant, regardless of its truth or falsity, such evidence is admissible as a verbal act. . . . (Footnotes omitted)

542 P.2d at 574.

See also *Nunley v. State*, 660 P.2d 1052, 1055 (Okl.Cr.1983); *Garcia v. State*, 639

P.2d 88, 89 (Okl.Cr.1981); *Godwin v. State*, 625 P.2d 1262, 1265 (Okl.Cr.1981).

The information to which Jones testified was knowledge which he acquired as a result of a general conversation with Appellant and others at the pool hall about the death of Roger Sarfaty. The testimony was not offered to prove the truth of the matter asserted, that the decedent had in fact been killed on Saturday and that the body was not found until Tuesday. Rather, it was offered to show that those in the pool hall, including Appellant and Jones, had talked about Sarfaty's death; as a basis for Appellant's statement to Jones and as the basis for Jones' observation of Appellant's demeanor. Therefore, as Appellant's testimony was not hearsay, Appellant's contention is denied.

[22] In his sixth assignment of error Appellant complains that two pieces of rope retrieved from the home shared by Woodruff and Denise Howe were improperly admitted into evidence. He argues that the State failed to show the relevance of the rope by connecting it to the crime. The general rule regarding demonstrative evidence is that it is admissible if it is relevant and the probative value of the evidence outweighs the prejudicial effect. *Sheker v. State*, 644 P.2d 560, 562 (Okl.Cr.1982), 12 O.S.1981, §§ 2402, 2403. Admission of a weapon in a murder case is proper if significant evidence exists from which a reasonable inference can be drawn that the weapon was used by the defendant to commit the crime. *Pannell v. State*, 640 P.2d 568, 571 (Okl.Cr.1982). On appeal, the burden of establishing prejudice from the admission of incompetent evidence is upon the defendant. *Moser v. State*, 509 P.2d 184, 185 (Okl.Cr.1973).

[23] In this case, the rope was received by the police from Denise Howe. She took the rope out of the closet shared with Woodruff at his request to "clear out the house." One of the pieces of rope was tied in a garrotte. Testimony established that the rope tied in this manner could be used as a strangulation device. The rope was examined by the medical examiner and found to

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be consistent with the size and weight of the rope which left the ligature marks on the decedent's body. The pattern of bruising on the decedent's neck was particularly unique and probative of the manner in which the rope was used. The way in which the rope was tied was compatible with the type of bruising which resulted. This Court has long held that in order to be relevant, the evidence need not conclusively, even directly, establish the defendant's guilt. Any legal evidence from which the jury may adduce the guilt or innocence of the defendant is admissible if, when taken with other evidence in the case, it tends to establish a material fact in issue. *Ashlock v. State*, 669 P.2d 308, 310 (Okl.Cr.1983); *Fahay v. State*, 288 P.2d 757, 760 (Okl.Cr. 1955). See also, 12 O.S.1981, § 2401.

The rope was relevant to the case in allowing the jury to visualize one of the weapons used in the attack. We find that the State sufficiently connected the rope to the crime and to the Appellant to permit its proper introduction into evidence. Accordingly, this assignment of error is denied.

[24] Further, Appellant finds error in the opinion testimony of Detective Mullinex that the rope was tied in a garrotte and in the demonstration of how it could be used as a weapon. The testimony was properly admitted under 12 O.S.1981, § 2702 as that of an expert. Under section 2702 expert opinion testimony is admissible if it is based upon specialized knowledge unavailable to the layman and if it will assist the trier of fact in making a decision.

Detective Mullinex was not originally assigned to Appellant's case but was the chief investigator by August 1986, when Denise Howe turned over the rope to the police. He subsequently submitted it to the forensics lab for analysis. His opinion that the rope was tied in a manner known as a garrotte and that a garrotte could be used as a strangulation device was based upon his personal knowledge. As a police officer he was certainly more familiar with the uses of a rope as a weapon than the general public. See *Farris v. State*, 670 P.2d 995, 997 (Okl.Cr.1983); *Harrell v. State*, 395 P.2d 331 (Okl.Cr.1964).

Further, the rope was a critical piece of evidence. The manner in which it was tied required an explanation. The opinion of Detective Mullinex was highly probative of the determination of whether or not the rope was used as a murder weapon. As such we find that the testimony met the requirements of Section 2702 and there was no error in admitting this testimony. See *Green v. State*, 713 P.2d 1032, 1039 (Okl.Cr.1985), *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 165 (1986).

[25] Detective Mullinex also demonstrated, over the objection of defense counsel, the use of the garrotte. It was placed around the neck of an Assistant District Attorney with the gap in the back where the two ropes were pulled together pointed out to the jury. Appellant argues it was error for the trial court to permit the demonstration.

The demonstration in the present case does not compare to that in two cases cited by the Appellant *Ford v. State*, 719 P.2d 457 (Okl.Cr.1986), and *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982). In *Ford* we condemned the prosecutor's conduct of demanding that the defendant pick up the gun used in the homicide and show the jury how it was used. While in *Brewer* we found the defendant was prejudiced during the prosecutor's cross-examination of the defendant's expert witness on insanity by stabbing a picture of the decedent with the knife allegedly used to commit the murder. In both cases the prosecutor's conduct was found to be prejudicial theatrics which went entirely outside the record and had no probative value.

The demonstration here is similar to that discussed in two cases cited by the State. In *State v. Sutherland*, 24 Wash.App. 719, 604 P.2d 957 (1979), *rev'd on other grounds*, 94 Wash.2d 527, 617 P.2d 1010 (1980), and *State v. Rich*, 395 A.2d 1123, 1131 (Me.1978), demonstrations of weapons for illustrative purposes were upheld. Although the defendant was not placed in actual possession of the weapon used in either case, the demonstrations were found relevant and helpful to the jury. In *Sutherland* the evidence established that the

defendant had purchased a .38 caliber Smith and Wesson revolver, a weapon which could produce the precise physical characteristics found on the bullets removed from the decedent and examined by the ballistics expert. The evidence also showed an absence of any record of the transfer of that weapon until the time of the decedent's death.

In *Rich* the evidence showed that the murder weapon was a penguin. The defendant owned and carried a penguin which he threw into the water off the wharf shortly after the murder took place. The exhibition of a penguin to the jury, similar to the one owned by the defendant and of a type unknown to the general public, was upheld as the unique physical makeup aided in explaining to the jury its construction and use.

In the present case, the rope was removed by the co-defendant's girlfriend, at his request, from a closet shared by the two. The physical characteristics of the rope were consistent with the marks left on the decedent's body. Contrary to Appellant's assertion, the general public is not familiar with the use of a garrote or the process of strangulation. Because of the specific configuration in which the rope was tied, the demonstration was highly informative.

Further, we do not find the demonstration "grandstanding" as Appellant suggests, but an illustration of a use of the evidence which was helpful to the jury in deciding the issue before them. The brief demonstration was not so prejudicial as to outweigh the probative value of helping the jury understand how the rope could have been used. Appellant was able to thoroughly cross-examine Detective Mullinex as to his opinion and demonstration. Therefore, we find that the trial court did not abuse its discretion in permitting the demonstration. See *Palmer v. State*, 719 P.2d 1285, 1288 (Okla.Cr.1986). This assignment of error is denied.

IV. ISSUES RELATING TO PUNISHMENT

[26] Title 21 O.S.1981, § 701.11, provides in part that if a jury returns a verdict

of death, "it shall designate in writing the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt." Appellant challenges the constitutionality of this section arguing that it mandates a general verdict with special findings of fact, a type of verdict prohibited by Art. 7, § 15 of the Oklahoma Constitution.

It is a well established rule of law that a legislative act is presumed to be constitutional. *Hilliary v. State*, 630 P.2d 791, 794 (Okla.Cr.1981); *White v. Coleman*, 475 P.2d 404, 405 (Okla.Cr.1970). Whenever reasonably possible statutes should be construed so as to uphold their constitutionality. *State v. Madden*, 562 P.2d 1177, 1179 (Okla.Cr.1977). The party attacking the constitutionality of the statute has the burden of proof. *Williamson v. State*, 463 P.2d 1004 (Okla.Cr.1969). When reviewing the constitutionality of a legislative act, we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but rather to see whether the act is prohibited. *Draper v. State*, 621 P.2d 1142, 1146 (Okla.1980).

[27] Title 21 O.S.1981, § 701.11 addresses the procedures to be followed during the sentencing stage of a capital murder trial. Appellant specifically challenges the constitutionality of the following portion of Section 701.11:

... the jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt.

Our state constitution does not address the role of the jury in sentencing a defendant convicted of a criminal offense. The constitution provides that "the right to trial by jury shall be and remain inviolate ..." Okla. Const. art. 2, § 19. And that "in all jury trials, the jury shall return a general verdict, and no law shall require a court to direct the jury to make findings of particu-

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constitution does not address ie jury in sentencing a defen- d of a criminal offense. The rovides that "the right to trial be and remain inviolate ..." rt. 2, § 19. And that "in all ie jury shall return a general o law shall require a court to y to make findings of particu-

lar questions of fact, but the court may, in its discretion, direct such specific findings. *Id.*, art. 7, § 15. This language is unique to the Oklahoma Constitution. See *Smith v. Gizzi*, 564 P.2d 1009, 1013 (Okla.1977). Further, the provisions of Article 7, § 15, apply to "all jury trials" in the state of Oklahoma. Therefore, we must consider the application of this constitutional language by the Oklahoma Supreme Court.

The same type of legal argument was presented to the Oklahoma Supreme Court regarding the application of Oklahoma's Comparative Negligence Statutes as Appellant has presented here regarding the capital sentencing process. See *Smith v. Gizzi, Id.*; *Vaught v. Holland*, 554 P.2d 1174 (Okla.1976). In discussing the definitions of "general" and "special" verdicts the court stated:

The jury under a special verdict is limited to the findings of specified facts and should not know the legal effect of its answers. Defendant is correct that in those states using a special verdict the court may create error by informing the jury of the effect of its answers. However, in Oklahoma, because our verdict must be general, this rule of law has no application. The jury not only must know the legal effect of its findings, but must determine the ultimate result, limited only by the special findings as to each parties degree of negligence. Such special findings are constitutionally and statutorily permitted. Under a general verdict, a jury must know the effect of its answers or it is not a general verdict. Under Oklahoma law the instruction was not error.

A trial court in Oklahoma however, must be cautious in presenting a verdict form to the jury to insure that it is a general verdict. If the verdict is not wholly determinative of the right of recovery the verdict would be special. As long as a jury finds in favor of either plaintiff or defendant, special findings of fact will not deprive the verdict of its generality. 564 P.2d at 1013.

This interpretation is consistent with the legislative definition of the form of verdict

in criminal cases set forth at 22 O.S.1981, § 914, which states "[a] general verdict upon a plea of not guilty, is either 'guilty', or 'not guilty', which imports a conviction or acquittal of the offense charged". The constitutional right to jury trials in Oklahoma relates only to the determination of guilt. Art. 2, § 19. Therefore, the provisions of Article 7, § 15, must be read and applied in that context. This interpretation is consistent with the provisions of Section 914. *Id.*

The law and procedure to be followed in sentencing an individual convicted of a criminal offense is found in the statutory provisions of Title 21 and 22, specifically in 22 O.S.1981, § 926 and 21 O.S.1981, § 701.10. Section 926 provides that in all cases of a verdict of conviction for any offense against the State of Oklahoma, the jury may, and shall upon the request of the defendant assess punishment. While Section 701.10, limited to convictions for first degree murder, provides for a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The challenged portion of Section 701.11 is merely further direction to the jury as to the procedure to be used in determining punishment. Designating the statutory aggravating circumstances found by the jury to support the death sentence does not constitute a verdict with special findings as the result of the jury's second stage deliberations is not a true "verdict". The "verdict" is a determination of the guilt or innocence of the accused, not the determination of the punishment to be imposed. See 22 O.S.1981, §§ 16 and 914.

We have thoroughly examined the Constitution and find no restraints prohibiting the Legislature from enacting statutory provisions governing the sentencing of defendants convicted of first degree murder. Based on the above analysis, we find, as did the Oklahoma Supreme Court in *Smith*, that the verdicts rendered in accordance with our capital sentencing procedure are general verdicts which comply with the requirements of Art. 7, § 15.

[28] During the second stage of trial, the State sought to prove four aggravating circumstances: 1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; 2) the murder was especially heinous, atrocious or cruel; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and 4) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Appellant contends that his death sentence should be modified to life imprisonment because at the time of Roger Sarfaty's murder, the aggravating circumstance "especially heinous, atrocious or cruel" was unconstitutionally vague. Roger Sarfaty was found murdered on October 16, 1985. In its 1988 decision of *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the United States Supreme Court held that the aggravating circumstance of "especially heinous, atrocious or cruel" was constitutionally invalid as applied in that case because 1) the jury was not guided by language sufficient to bridle its discretion and 2) this Court did not cure any unbridled jury discretion by narrowing the application of the aggravating circumstance. 486 U.S. at 363-65, 108 S.Ct. at 1859.

This Court narrowed the interpretation of that particular aggravating circumstance in *Stouffer v. State*, 742 P.2d 562, 563 (Okla.Cr.1987) (Opinion on Rehearing), cert. denied, 484 U.S. 1036, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988), to apply to instances of death preceded by torture or serious physical abuse. The judicially restricted interpretation was applied to a murder committed in 1985. In *Foster v. State*, 779 P.2d 591 (Okla.Cr.1989), we recognized that the problems underlying the reversal of Cartwright's death sentence stems from the fact that the jury was given incomplete instructions. The instructions did not address the limiting factors previously adopted and mandated by this Court for use with the aggravating circumstance "especially heinous and cruel."

The jury instruction given in the present case, both paragraphs of Oklahoma Uni-

form Jury Instructions—Criminal No. 436, embodies the limitations which the sentence must consider in the application and finding of this particular aggravating circumstance. We have reexamined these principles on several occasions and have since consistently applied the narrow construction discussed above. See *Boltz v. State*, 806 P.2d 1117 (Okla.Cr.1991); *Moore v. State*, 788 P.2d 387, 401-402 (Okla.Cr.1990); *Fox*, 779 P.2d at 576; *Fowler v. State*, 779 P.2d 580, 588 (Okla.Cr.1989); *Nguyen v. State*, 769 P.2d 167, 174 (Okla.Cr.1988); *Rojem v. State*, 753 P.2d 359 (Okla.Cr.1988); *Hale v. State*, 750 P.2d 130, 142 (Okla.Cr.1988); *Mann v. State*, 749 P.2d 1151, 1160 (Okla.Cr.1988). Accordingly, we find that this particular aggravating circumstance was applied in a constitutional manner in the present case.

[29, 30] Appellant contends next that the State failed to prove beyond a reasonable doubt the murder was especially heinous, atrocious or cruel. Appellant argues that this particular aggravating circumstance must fall pursuant to our decision in *Brown v. State*, 753 P.2d 908 (Okla.Cr.1988), as the medical examiner was unable to state which of two potentially fatal wounds, the strangulation or stabbing, was inflicted first.

The evidence supporting a finding that the murder was especially heinous, atrocious or cruel requires proof that the death was preceded by torture or serious physical abuse. *Id.* Doctor Chai Choi, a forensic pathologist with the Office of the Chief Medical Examiner, testified that bruises and abrasions to the decedent's knees and elbows suggested that a struggle had taken place prior to the murder. Ligature marks on the decedent's wrists and ankles indicated that he had been forcefully restrained with his wrists and ankles bound. Injuries to the decedent's head showed that he had been struck approximately five times with a long blunt object, producing wounds consistent with those created by a baseball bat. She further testified that the cause of death was strangulation, a death which occurred only after three to five minutes of slow suffocation. Dr. Choi also

Instructions—Criminal No. 436, the limitations which the sentence must consider in the application and finding of this particular aggravating circumstance. We have reexamined these principles on several occasions and have since consistently applied the narrow construction discussed above. See *Boltz v. State*, 806 P.2d 1117 (Okla.Cr.1991); *Moore v. State*, 788 P.2d 387, 401-402 (Okla.Cr.1990); *Fox*, 779 P.2d at 576; *Fowler v. State*, 779 P.2d 580, 588 (Okla.Cr.1989); *Nguyen v. State*, 769 P.2d 167, 174 (Okla.Cr.1988); *Rojem v. State*, 753 P.2d 359 (Okla.Cr.1988); *Hale v. State*, 750 P.2d 130, 142 (Okla.Cr.1988); *Mann v. State*, 749 P.2d 1151, 1160 (Okla.Cr.1988). Accordingly, we find that this particular aggravating circumstance was applied in a constitutional manner in the present case.

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testified that the decedent suffered five (5) stab wounds, two (2) of which were potentially fatal.

In *Brown*, we found insufficient evidence to support a finding that the murder was heinous, atrocious, or cruel as the medical examiner could not state which of the seven gunshot wounds was the fatal wound. This is clearly distinguishable from the present case wherein Dr. Choi testified that the injuries received by the decedent indicated that the strangulation preceded the stabbing. Although some of the bruising and lacerations to the arms and head occurred after the decedent's death, she unequivocally stated that the cause of death was suffocation caused by the strangulation.

When the sufficiency of the evidence of an aggravating circumstance is challenged on appeal, the proper test is whether there was any competent evidence to support the State's charge that the aggravating circumstance existed. In making this determination, this Court should view the evidence in the light most favorable to the State. *Brogie v. State*, 695 P.2d 538, 542 (Okla.Cr.1985), modified on other grounds, 760 P.2d 1316 (Okla.Cr.1988).

When the evidence is considered in this light, we find it was clearly sufficient. Evidence that the decedent struggled with his assailants, was beaten with a blunt instrument several times and ultimately died of strangulation was sufficient to establish the requisite torture or serious physical abuse necessary to sustain the aggravating circumstance that the murder was heinous, atrocious or cruel. In making this determination, we have specifically excluded the stab wounds inflicted post-mortem. Accordingly, we find that Roger Sarfaty's murder was especially heinous, atrocious or cruel and that the jury's finding of this particular aggravating circumstance was based on substantial uncontradicted evidence.

[31] In his next assignment of error, Appellant alleges that the evidence was insufficient to prove that he killed the decedent for the purpose of avoiding or preventing lawful arrest or prosecution. The

existence of this aggravating circumstance is determined by looking at the killer's intent. *Williamson v. State*, 812 P.2d 384, 407 (Okla.Cr.1991). *Fox*, 779 P.2d at 576; *Fowler*, 779 P.2d at 588; *Stouffer v. State*, 738 P.2d 1349, 1361-1362 (Okla.Cr.1987); *Moore v. State*, 736 P.2d 161, 165 (Okla.Cr.1987). In the absence of his own statements of intent, such evidence may be inferred from circumstantial evidence. *Rojem*, 753 P.2d at 368; *Banks*, 701 P.2d at 426.

[32] Evidence presented by the State showed that Appellant knew Sarfaty planned to rob him, and because Sarfaty knew him, Appellant would have to kill him to keep from being caught. We find the sufficient evidence from which a rational juror could have found beyond a reasonable doubt the existence of this aggravating circumstance.

[33] In his thirteenth assignment of error Appellant contends that the aggravating circumstance "continuing threat" must be set aside and the death sentence vacated as the principles of double jeopardy and collateral estoppel bar the jury's finding of this aggravator. At the time of the present trial, Appellant and co-defendant Woodruff had been previously tried by jury and convicted of the murder of Lloyd Thompson. During the Thompson trial, the State presented evidence of the Sarfaty homicide in the second stage to support the aggravating circumstance that the defendants constituted a continuing threat to society. The jury in that trial rejected that aggravating circumstance. Appellant now argues that the State is precluded from using that same evidence in the instant case to determine whether Appellant constitutes a continuing threat to society.

In *Ashe v. Swenson*, 397 U.S. 436, 449, 90 S.Ct. 1189, 1193, 25 L.Ed.2d 469, 484 (1970) the Supreme Court stated that collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment that issue cannot again be litigated between the same parties in any future lawsuit." The Court held that collateral

toppel was not only a requirement of process, but was a part of the Fifth Amendment's guarantee against double jeopardy.

The Double Jeopardy prohibition constitutionally guaranteed by the Fifth Amendment to the United States Constitution and Article 2, § 21, of the Oklahoma Constitution applies only to an individual's right not to be placed twice in jeopardy for the same offense. While the doctrine of collateral estoppel, adopted by the Court in *Ashe*, is much broader and applies to the adjudication by a trier of fact that the accused was not the person who committed the acts comprising the charged offense or that the accused had not committed an essential element of a separate and distinct offense. The foundational question which must be answered in determining the applicability of collateral estoppel is whether there has been a prior adjudication by a trier of fact which in effect acquits the accused of the specific charged offense or an essential element of a separate and distinct offense. See *Ellis v. State*, 834 P.2d 985 (Okla. Cr. 1992); *White v. State*, 821 P.2d 378 (Okla. Cr. 1991) (Lumpkin, J. concurring in results).

In *Buckaloo v. State*, 650 P.2d 885 (Okla. Cr. 1982), the State sought to enhance the defendant's punishment for second degree burglary with three prior felony convictions. The jury declined to find the defendant guilty of the former convictions. Subsequently, the defendant was charged and tried for first degree robbery. At the robbery trial, the State again sought to enhance punishment with the same three felony convictions used in the prior trial. The defendant argued that the previous jury's refusal to find him guilty of the former convictions estopped the State from using the same three convictions for enhancement purposes in all subsequent prosecutions.

This Court disagreed with the defendant's argument stating that the determination of punishment in one case, using the facts of another case, is not a decision of ultimate fact in the cases used for enhancement. Quoting *Jordan v. State*, 327 P.2d

712 (Okla. Cr. 1958), we said that providing enhanced punishment for second and subsequent offenses does not create or define a new or independent crime, but describes circumstances where one found guilty of a specific crime may be more severely penalized because of his previous conviction. 650 P.2d at 887. In *Johnson v. District Court of Oklahoma County*, 653 P.2d 215, 219 (Okla. Cr. 1982) we stated:

Furthermore, during the sentencing stage of a capital case, the court or jury may consider relevant evidence that might not otherwise be admissible at trial, i.e., evidence of other crimes, and prior convictions. There must be due process limitations on the introduction of this evidence during the sentencing stage. However, the consideration of this evidence does not constitute double jeopardy. The defendant is not being punished a second time for the same offense; instead, the evidence is used to establish the defendant's character and criminal propensities which may justify the imposition of the death penalty. 653 P.2d at 218-219.

Based upon the foregoing, we find that the use of evidence of the Sarfaty homicide to prove "continuing threat" was not prohibited under the doctrine of collateral estoppel. The jury's consideration of the evidence of Sarfaty's murder during the second stage of the Thompson trial was not a final decision on the ultimate issue of Appellant's guilt or innocence of Sarfaty's murder. As we stated in *Johnson*, "To find otherwise, would abrogate the legislative intent to hold a defendant responsible for his separate and distinct acts of criminal misconduct." 653 P.2d at 219. This assignment of error is therefore denied.

[34] In his fourteenth assignment of error Appellant challenges the application of the aggravating circumstance of "continuing threat" arguing that the circumstance is unconstitutionally vague as applied and that the instructions given to the jury failed to adequately channel the sentencer's discretion. Appellant has properly preserved this issue for appellate review as he

3), we said that providing punishment for second and subsequent offenses does not create or define an independent crime, but describes circumstances where one found guilty of a specific crime may be more severely penalized because of his previous conviction. 887. In *Johnson v. District Court of Oklahoma County*, 653 P.2d 215, 219 (Okla. Cr. 1982) we stated:

Moreover, during the sentencing stage of a capital case, the court or jury may consider relevant evidence that might not otherwise be admissible at trial, i.e., evidence of other crimes, and prior convictions. There must be due process limitations on the introduction of evidence during the sentencing stage. However, the consideration of evidence does not constitute double jeopardy. The defendant is not being punished a second time for the same offense; instead, the evidence is used to establish the defendant's character and criminal propensities which may justify the imposition of the death penalty. 653 P.2d at 218-219.

In the foregoing, we find that the use of evidence of the Sarfaty homicide to prove "continuing threat" was not prohibited under the doctrine of collateral estoppel. The jury's consideration of the evidence of Sarfaty's murder during the second stage of the Thompson trial was not a final decision on the ultimate issue of Appellant's guilt or innocence of Sarfaty's murder. As we stated in *Johnson*, "To find otherwise, would abrogate the legislative intent to hold a defendant responsible for his separate and distinct acts of criminal misconduct." 653 P.2d at 219. This assignment of error is therefore denied.

In his fourteenth assignment of error Appellant challenges the application of the aggravating circumstance of "continuing threat" arguing that the circumstance is unconstitutionally vague as applied and that the instructions given to the jury failed to adequately channel the sentencer's discretion. Appellant has properly preserved this issue for appellate review as he

submitted two (2) proposed jury instructions to the court.⁴

However, we have previously analyzed and upheld this aggravating circumstance finding it specific, not vague, and readily understandable. *Boltz*, 806 P.2d at 1125; *Munson v. State*, 758 P.2d 324, 335 (Okla. Cr. 1988); *Liles v. State*, 702 P.2d 1025, 1031 (Okla. Cr. 1985); *VanWoundenberg v. State*, 720 P.2d 328, 336 (Okla. Cr. 1986), cert. denied, 479 U.S. 956, 107 S.Ct. 447, 93 L.Ed.2d 395 (1986).

We are not now persuaded to alter that position. Accordingly, this assignment of error is denied.

[35] In his fifteenth assignment of error Appellant contends that the trial court erred in admitting any evidence of his conviction for the Thompson murder as it was not a final conviction and was then pending on appeal. To prove the aggravating circumstance of "continuing threat" the State presented evidence of the Thompson murder, specifically testimony by Thompson's neighbor concerning her observations the day of the homicide, the autopsy report reflecting the pathological diagnoses of the victim and photographs and fingerprints showing that the defendant in that case was in fact the Appellant. The fact that Appellant's conviction for this murder was not final does not affect the admissibility of evidence of the offense. In *Johnson v. State*, 665 P.2d 815, 822 (Okla. Cr. 1982), this Court held:

Evidence of a defendant's criminal record, or prior unadjudicated acts of violent conduct is relevant to the determination of whether the defendant is likely to commit future acts of violence that would constitute a continuing threat to society.... It is not necessary there be a final conviction for an unrelated criminal offense to be admissible at the sentencing stage.

See also *VanWoundenberg v. State*, 720 P.2d at 337.

4. Defendant's proposed Instruction No. 13 defined the term "society" and proposed Instruction No. 18 instructed the jury to look to the Appellant's background, psychological studies

[36] Our decision is not altered by the fact that Appellant's conviction for the Thompson homicide has been reversed and remanded for a new trial. See *Romanb v. State*, 827 P.2d 1335 (Okla. Cr. 1992). As the case was not reversed on the basis of insufficient evidence of guilt, the facts of the Thompson homicide remain relevant evidence which the jury in the instant case should consider in determining the appropriateness of the death sentence. Contrary to Appellant's argument, this decision is not violative of the dictates of *Johnson v. Mississippi*, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), wherein the Supreme Court specifically declined to review the possible relevance of the conduct giving rise to the prior conviction which had been set aside as no evidence describing that conduct had been presented to the jury.

[37] However, the same cannot be said of the judgment and sentence and docket sheet from the Thompson case. This evidence was admitted to show that a prior conviction had been obtained and that it was not final but on appeal. As that prior conviction has fallen, the judgment and sentence is no longer proper support for the "prior violent felony" aggravating circumstance. Therefore, this aggravator falls.

[38] In his seventeenth assignment of error Appellant argues that he is entitled to a modification of his sentence should one aggravator fall because this Court's practice of reweighing aggravating circumstances versus mitigating evidence usurps the jury's function. Specifically, he argues that reweighing is unconstitutional because it deprives the defendant of the right to be sentenced by a jury of his peers and applied to this case would be a violation of the prohibition against *ex post facto* laws. This argument has previously been rejected in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990).

In *Castro v. State*, 749 P.2d 1146, 1148 (Okla. Cr. 1987) cert. denied, 485 U.S. 971,

and demeanor at trial to see if there were indicators that would support the circumstance. (O.R. 272, 278)

108 S.Ct. 1248, 99 L.Ed.2d 446 (1988) we determined that the potential reevaluation of the defendant's sentence during direct appeal proceedings does not encroach upon his right to jury sentencing and permits this Court to affirm the death sentence even if one aggravating circumstance fails. Although the capital sentencing statutory scheme does provide for jury sentencing, it also provides for sentence review by the Court and for review by the state district court and this Court through post-conviction procedures. 21 O.S.Supp.1985, § 701.13; 22 O.S.1981, § 1080 *et seq.* The *ex post facto* claim was also specifically rejected in *Castro*, as we stated that reweighing the aggravating circumstances against the mitigating evidence was procedural and does not criminalize innocent conduct nor increase the crime. 749 P.2d at 1150-1151. Accordingly, this assignment of error is denied.

[39] Appellant further argues that sentence of death is unreliable because the jury's sense of responsibility was diminished by acts of the trial court and the prosecutor. Specifically, Appellant directs our attention to the trial court's direction to the jury during voir dire that their function was to recommend punishment, the fact that reflected in the judgment and sentence for the Thompson murder was Appellant's sentence of death, and a comment by the prosecutor during closing argument to "put the defendant on death row."

The jury has the prime responsibility for deciding whether the death penalty should be imposed. We must be cautious to avoid any actions or directions which would tend to reduce the jurors' sense of responsibility for their decision. In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court stated that the constitution prohibits imposition of a death penalty which rests on a "determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* 472 U.S. at 328-329, 105 S.Ct. at 2639. No such misconception exists on this record. During voir dire, the trial court asked each

prospective juror in part: "If you find beyond a reasonable doubt that the Defendants are guilty of Murder in the first degree, your duty is to determine whether or not, considering the evidence, you should recommend death."

We find no error as this is a proper statement of the law. See 22 O.S.1981, § 961 *et seq.*, § 1001 *et seq.* Further, in light of the explicit instructions given during second stage, nothing in the court's conduct can be said to have diverted the jury from its "awesome responsibility." *Caldwell*, 472 U.S. at 330, 105 S.Ct. at 2640.

Learning that the defendant had previously received a death sentence for another murder could diminish the jury's sense of importance of its role and mitigate the consequences of their decision. However, when the jury is properly instructed as to its role and responsibility in making such a determination we cannot, on appellate review, conclude that the jury in any way shifted the responsibility for their decision or considered their decision any less significant than they would otherwise.

In the present case, the importance of the jury's role at sentencing is evident from the instructions. The jury was instructed that it had the responsibility for determining whether the death penalty should be imposed. They were informed of their role as factfinders, that the weight and value of testimony and evidence was for them to determine, that they should not surrender their own judgment to that of any witness or item of evidence, and of their duty to follow the law in reaching their conclusion. It was never conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized. The instructions given to the jury provided sufficient guidance as to how their judgment should be exercised. In this light, it is highly unlikely that the jury's sense of responsibility would have been diminished based upon knowledge of the prior imposition of the death sentence.

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The "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983). Reviewing the sentencing determination in the present case under this heightened standard, but also with a presumption of correctness, we find no reason to question the jury's conclusion. While evidence of the imposition of the death penalty by another jury is not relevant in determining the appropriateness of the death sentence for the instant offense, the admission of this evidence did not so infect the sentencing determination with unfairness as to make the determination to impose the death penalty a denial of due process.

Further, the prosecutor's request of the jury to put the defendants on death row is not violative of the *Caldwell* rule. This brief remark was simply a way of asking the jury to impose the death penalty. We do not find that this comment in any way led the jury to believe that the ultimate responsibility for the defendants' fate rested elsewhere. Accordingly, this assignment of error is denied.

[40, 41] Appellant offered evidence in mitigation of his completion of numerous bible study courses and the testimony of the jail's chaplain concerning his religious accomplishments. On re-direct examination, defense counsel asked Helen Pearce, Assistant Chaplain in the Oklahoma County Jail, if she felt that Appellant was involved in "jailhouse religion" or if she felt it was something more. The prosecutor's objection was sustained. Appellant now objects to that ruling, to the use of the term "jailhouse religion" in the prosecutor's closing argument, and to jury instructions which directed consideration of aggravating circumstances in mandatory terms but consideration of mitigating evidence in permissive terms.

Initially, we find that the trial court properly precluded Ms. Pearce from giving her personal opinion as to Appellant's religious commitment. Such testimony called for

mere speculation on the part of the witness and was not helpful to a clear understanding of the issue. See 12 O.S.1981, § 270. Further, we find no error in the prosecutor's use of the term "jailhouse religion" during closing argument. The comments in the State's closing argument were reasonable inferences based upon the term as brought up during the testimony of Ms. Pearce. Moreover, the remark was not met with an objection by the defense during closing argument.

[42] Further, the jury was not prevented from considering any relevant mitigating evidence. Instruction No. 9 informed the jury that "mitigating circumstances are those, which in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame." The jury was further told that the determination of what was mitigating evidence was for them to determine. Instruction No. 1 provided a list seventeen (17) specific items which the jury could consider as evidence to mitigate Appellant's punishment. The jury was instructed that whether the listed circumstances existed and whether they were mitigating evidence was their decision. The jury was also provided a list of the aggravating circumstances which the State sought to prove against the Appellant. Instruction No. 7 informed the jury that the defendant is presumed innocent of the charges made in the Bill of Particulars and it is the burden of the State to prove beyond a reasonable doubt the aggravating circumstances alleged. Additional instructions informed the jury that it could only recommend a death sentence upon a unanimous finding of the existence beyond a reasonable doubt of one or more aggravating circumstance or circumstances, and upon a unanimous finding that any such aggravating circumstance or circumstance outweighed the finding of mitigating circumstances. 21 O.S.Supp.1987, § 701.1.

We find that the instructions given in the present case do not direct the jury to disregard any mitigating evidence. Rather, the instructions provide the fullest possible latitude for the consideration of evidence in mitigation. The jury was not prohibited from

any way from considering any and all relevant mitigating evidence. See *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). As the instructions given adequately apprised the jury of the method by which it should determine the sentence against the defendant, this assignment of error is denied.

[43] Appellant further alleges in his eighteenth assignment of error that the trial court erred in failing to instruct the jury that it had the option to return a life sentence regardless of its findings respecting aggravating and mitigating circumstances. Reviewing for fundamental error only as the Appellant failed to request such an instruction, we find no error warranting reversal or modification of sentence.

In *Walker v. State*, 723 P.2d 273, 284 (Okla.Cr.1986), the appellant claimed error in the refusal to give his requested instruction on "jury nullification". Defined as "the jury's exercise of its inherent power to bring in a verdict of [acquittal] in the teeth of both the law and facts", we found that most courts have uniformly held that a defendant is not entitled to such an instruction. See also *Williamson v. State*, 812 P.2d at 410. We find no error in the omission of this instruction.

[44] Appellant contends in his nineteenth assignment of error that the trial court erred in instructing the jury not to allow sympathy, sentiment or prejudice to enter into its deliberations. This argument was rejected in *Fox v. State*, 779 P.2d at 574-575. We are not persuaded to deter from that position. See also *Williamson*, 812 P.2d at 408; *Moore v. State*, 788 P.2d 387, 401 (Okla.Cr.1990). Accordingly, this assignment of error is denied.

[45] In his twenty-first assignment of error Appellant alleges that the trial court failed to properly instruct the jury concerning the burden of proof and the manner in which to weigh the aggravating circumstances and mitigating evidence. Specific standards for balancing aggravating and mitigating circumstances are not constitutionally required. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235

(1983). See also *Walker v. State*, 723 P.2d at 284; *Brogie v. State*, 695 P.2d at 544. The instructions given to the jury properly advised them to weigh the aggravating circumstances against the mitigating evidence. Instructions No. 8 through 12 comprehensively informed the jury that a finding of the aggravating circumstances beyond a reasonable doubt is not by itself enough to assess the death penalty. Rather, the aggravating circumstances must clearly outweigh the mitigating, or death may not be imposed. Similar instructions have passed constitutional muster. See *Davis v. State*, 665 P.2d 1186, 1202 (Okla.Cr.1983).

[46] Further, the trial court properly denied Appellant's requested instruction which placed a "beyond a reasonable doubt" standard on the ultimate life or death determination. In *Johnson v. State*, 731 P.2d 993 (Okla.Cr.1987), we held that the burden of proof analysis is not strictly applicable to the weighing process. Quoting to *Daniels v. State*, 453 N.E.2d 160 (Ind.1983), we stated that while the State must prove beyond a reasonable doubt the existence of at least one of the enumerated aggravating circumstances, the determination of the weight to be accorded the aggravating and mitigating circumstances is not a fact which must be proved beyond a reasonable doubt. Instead, it is a balancing process. 731 P.2d at 1005.

[47] In his twenty-fourth assignment of error, Appellant contends that Oklahoma's death penalty statutes are unconstitutional as they allow unbridled prosecutorial discretion in seeking the death penalty. Appellant argues that, aside from the statutory aggravating circumstances, statutes provide no guidelines for determining when prosecutors should seek the death penalty. Because of the lack of adequate guidelines, Appellant continues, the decision whether or not to seek the death penalty will, and does to a great degree, depend on the whim of the individual prosecutor. A similar argument was raised in *Crumley v. State*, 815 P.2d 676 (Okla.Cr.1991). We preface our remarks here, as we did in *Crumley*, with the notation that we do not take alle-

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gations like these lightly, however, Appellant has provided nothing in support of his theory except unsubstantiated speculation.

The decision regarding which criminal charge to bring lies within the wide parameters of prosecutorial discretion. *Gray v. State*, 650 P.2d 880, 882 (Okla.Cr.1982). See also *Dangerfield v. State*, 742 P.2d 573 (Okla.Cr.1987). However, prosecutorial discretion is not unlimited. In *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978), the Supreme Court stated:

the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was [not] deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.

Nor do we find such selectivity in itself to be a state constitutional violation. Limits on this discretion exist by virtue of the statutory schemes governing criminal law as well as those governing the practice of law. See *Ray v. State*, 510 P.2d 1395 (Okla.Cr.1973) (wherein this Court adopted the American Bar Association Standards for Criminal Justice). See also 5 O.S.1981, Ch. 1, App. 3, DR 7-103(A) and 5 O.S.Supp. 1988, Ch. 1, App. 3A, Rule 3.8. Rules of Professional Conduct (prohibiting a prosecutor from bringing charges unless supported by probable cause). Prosecutors are presumed by law to act in good faith when determining which crimes to prosecute and which punishments to seek. *United States v. Blitstein*, 626 F.2d 774 (10th Cir.1980); *United States v. Bennett*, 539 F.2d 45 (10th Cir.1976) cert. denied, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976).

As the Tenth Circuit Court of Appeals stated in *Blitstein* "It is the obligation of a criminal defendant to demonstrate that the government's prosecution of him was based upon impermissible discriminatory grounds..." *Id.* at 782. We find that in the present case, the Appellant has failed to make such a showing and that when the statutes and case law are considered together, sufficient guidelines exist to prop-

erly direct prosecutorial discretion in making the decision whether to seek the death penalty.

[48] Finally, Appellant argues that the one thousand year prison sentence for the Robbery is excessive. It is well settled that the question of excessiveness of punishment must be determined by a study of all the facts and circumstances of each case. *Rogers v. State*, 507 P.2d 589, 591 (Okla.Cr.1973). This Court does not have the power to modify a sentence unless we can conscientiously say that under all the facts and circumstances that the sentence is so excessive as to shock the conscience of the Court. *Huntley v. State*, 750 P.2d 1134, 1136 (Okla.Cr.1988).

Appellant's prior felony convictions and the violent manner in which the robbery was committed support the sentence. Accordingly, this assignment of error is denied.

V. MANDATORY SENTENCE REVIEW

Pursuant to 21 O.S.Supp.1987, § 701.13(C), we must determine (1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the jury's finding of an aggravating circumstance as enumerated in 21 O.S.1981, § 701.12. As noted above, the aggravating circumstance of prior felony conviction involving the use or threat of violence has not been supported by the evidence and therefore falls. In *Stouff v. State*, 742 P.2d at 564 this Court held that an independent reweighing of aggravating circumstances and mitigating evidence is implicit to our statutory duty to determine the factual substantiation of the verdict and the validity of the death sentence. See also *Battenfield*, 816 P.2d at 564; *Sellers*, 809 P.2d at 691; *Castro*, 742 P.2d 1146. In *Clemons*, 494 U.S. at 745, 751, 110 S.Ct. at 1449, the Supreme Court found nothing in appellate weighing or reweighing of the aggravating circumstances and mitigating evidence that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death se-

tence. The Court further stated that appellate courts are not hindered in performing this function without written jury findings concerning mitigating circumstances.

[49] We have already found the evidence sufficient to support the jury's finding of the other aggravating circumstances found by the jury, i.e. that the murder was especially heinous, atrocious or cruel; that the murder was committed to avoid lawful arrest or prosecution, and that the Appellant constitutes a continuing threat to society. Evidence in mitigation presented in this case consisted of testimony from Appellant's family members concerning Appellant's childhood, including the trauma experienced when he was fourteen by the divorce of his parents; the love and support of family and friends; his record of being a good worker; his status as a trustee in the county jail and role as problem solver; his completion of bible study courses and involvement in the jail ministry; and his prospects for rehabilitation.

Discarding the evidence supporting the "prior violent felony conviction" aggravating circumstance, and carefully weighing the remaining aggravating circumstances against the mitigating evidence presented at trial, we find the sentence of death to be factually substantiated and appropriate.

Finding no error warranting reversal or modification, the judgments and sentences for Robbery with a Dangerous Weapon, After Former Conviction of a Felony and First Degree Murder are AFFIRMED.

LANE, P.J., and JOHNSON, J., concur.

BRETT, J., not participating.



STATE of Oklahoma, Appellant.

v.

L.D.D., N.D.E., Appellees.

No. S-92-594.

Court of Criminal Appeals of Oklahoma

Feb. 8, 1993

State sought to have juveniles who were 16 and 17 years of age when they were charged with attempted robbery with a firearm treated as adults under reverse certification statute. Magistrate Robert Perugino sustained juveniles' motion to dismiss and ordered case transferred to the Juvenile Court. The District Court, Judge Jennings, J., upheld magistrate's ruling. State appealed. The Court of Criminal Appeals held that: (1) juveniles could not automatically be considered as adults after having been charged with that offense which was not one of the enumerated offenses under reverse certification statute; (2) language in reverse certification statute allowing persons who were 16 or 17 years of age to be considered as an adult when they were charged with "use of a firearm or other offensive weapon while committing a felony" could not be used to certify subject juveniles as adults, as charging language in information did not indicate they were alternatively charged with that specific crime; and (3) state could seek to have juveniles certified as adults through certification procedure provided in separate statute.

Affirmed.

1. Infants ¶68.6

Juveniles charged with attempted robbery with a firearm could not automatically be considered as adults under reverse certification statute, as that offense was not one of the enumerated offenses thereunder. 10 Okl.St. Ann. § 1104.2.

2. Infants ¶68.5

Language in reverse certification statute allowing person 16 or 17 years of age to be considered as an adult when they

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

JOHN JOSEPH ROMANO,

Petitioner,

-v-

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

APPENDIX "B"

Order Denying Petition for Rehearing
and Directing Issuance of Mandate

Supreme Court of the United States

No. 92-9093

John Jospeh Romano,

Petitioner

v.

Oklahoma

ON PETITION FOR WRIT OF CERTIORARI to the Court of Criminal Appeals of Oklahoma.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: "Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?"

November 1, 1993